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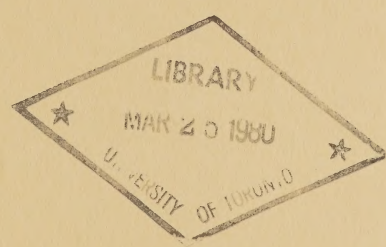
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Rule-Making Hearings: A General Statute for Ontario?



RULE-MAKING HEARINGS:
A GENERAL STATUTE FOR ONTARIO?

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Research Publication 9

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and Individual Privacy

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FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;
2. The individual's right of access and appeal in relation to the use of government information;
3. The categories of government information which should be treated as confidential in order to protect the public interest;
4. The effectiveness of present procedures for the dissemination of government information to the public;
5. The protection of individual privacy and the right of recourse in regard to the use of government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 9. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the province a good turn in having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

The Commission's terms of reference require it to make recommendations with respect to "the categories of government information which should be treated as confidential in order to protect the public interest". This aspect of its assignment raises a number of intriguing and very difficult questions. One of the most perplexing of these relates to the question of access to documents created in the process of formulating government policy, such as draft legislation and regulations, Cabinet documents, internal memoranda, task force reports, etc. In this context, the competing interests of the need for confidentiality and the desirability of access can both claim a substantial measure of public interest in their support. Some observers feel it is essential that the government of the day be permitted to conduct its policy-making function behind closed doors. Others feel equally as strongly that greater openness in this most vital function of government would be in the public interest, either as a matter of facilitating greater accountability with respect to government policy-making or, alternatively, as a device for promoting greater public participation in policy-making processes.

These problems will be canvassed in a general way in a research study currently being undertaken by members of the Commission's research team. The present paper by Professor Mullan very usefully considers one aspect of this problem -- the degree to which access should be given to policy material in the form of proposals for general policies or "rules" to be adopted by government and its agencies in the course of fulfilling their statutory responsibilities.

Every student of modern government appreciates that it is neither possible nor desirable for the legislature to formulate laws in sufficient detail to translate broad public policies into rules sufficiently specific to govern all instances of the application of a particular policy. To take a simple illustration, let us assume that the legislature has enacted a statute which has as its objective the protection of the natural environment. It is very likely that a ministry of the government or an agency established by the statute would be granted a statutory mandate to take concrete action to protect the environment. Further, the statute might create a number of offences designed to discourage or prevent pollution of the environment. It might stipulate, for example, that "no one shall discharge a contaminant into the natural environment". In turn, the ministry or agency, staffed by experts in environmental problems, might be expressly given a power under the statute to establish "emission control" standards which would elaborate the general standard of conduct proscribed by the statute.

A number of questions may be asked with respect to this standard-setting process. Should proposals for such standards be made available to the public prior to the time of their formal adoption by the agency? Should

interested parties have an opportunity to comment on the proposals? Would these questions be answered differently if the standards in question were required to be approved by Cabinet, or were required to be promulgated as regulations under the governing statute? Would different considerations arise if the proposed standards would not be binding in a strict legal sense but would be used by the agency, as a matter of practice, as a guideline for determining when to grant, let us say, a licence or approval of some kind?

Problems such as these have been addressed in the American experience by the adoption of so-called "rule-making" procedures which require, in essence, prior publication of proposed rules and an opportunity for interested parties to submit their comments to the agency in question. Professor Mullan has carefully analyzed this American experience and suggests in his paper that there are lessons which we in Ontario can draw from it.

Rule-making practices and the legal regulation thereof are topics of increasing interest and familiarity for lawyers, especially for those whose area of expertise is constitutional and administrative law. Others may find the subject a somewhat daunting one, however, and in order to provide an introduction to the subject for non-specialists, Professor Mullan has very helpfully prepared, at the Commission's request, an abstract of the paper which summarizes its main features. The abstract is reproduced at pages 1 to 13 within.

Professor Mullan is a Professor of Law at the Faculty of Law at Queen's University, who has published extensively on administrative law subjects. His many journal articles and monographs include Administrative Law (1973) and The Federal Court Act: A Study of the Court's Administrative Law Jurisdiction (1977).

The Commission has resolved to make available to the public its background research papers in the hope that they might stimulate public discussion. Those who wish to communicate their views in writing to the Commission are invited to address their comments to: Registrar, Commission on Freedom of Information and Individual Privacy, 22nd Floor, 180 Dundas Street West, Toronto, Ontario M5G 1Z8.

It should be emphasized that the views expressed in this paper are those of the author, and that they deal with questions on which the Commission has not yet reached a final conclusion.

Particulars of other research papers published to date by the Commission are to be found on page 232.

John D. McCamus
Director of Research

RULE-MAKING HEARINGS:
A GENERAL STATUTE FOR ONTARIO?

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February, 1979

ABSTRACT

One of the prominent features of government at the federal level in the United States is the obligation imposed on agencies and government departments by section 553 of the Administrative Procedure Act to give advance notice of intention to make subordinate legislation and an opportunity for the public to comment on it. This "notice and comment" procedure was created in 1946 and has since been paralleled in over half the States. Unlike a similar provision in force in the United Kingdom from 1893 to 1946, its impact on the conduct of government has been highly significant. The British statute was more honoured in the breach than in its observance. The United States provision has become a cornerstone of the whole administrative process. Indeed, this growth in significance has been increasingly marked as more and more agency and department activity shifts from the development of rules and policies on an ad hoc basis or in the context of individual adjudications to advance rule and subordinate legislation-making. It has also been spurred on in many instances by the Congress imposing more onerous procedural requirements than those established by section 553 and also by the federal courts which on occasion have not only engrafted further procedural requirements onto section 553 but have also compelled rule-making and, when the proposed rules and policies have "a substantial impact", even called for the following of section 553 procedures in situations specifically exempted by the section. The agencies and departments themselves have also shown a willingness to move beyond section 553 both in the sense

of adopting voluntarily more onerous procedures and in using "notice and comment" in exempted situations.

At present there is no Canadian parallel either federally or in any of the provinces to the general obligation to encourage public participation in rule-making created by section 553. On two prominent occasions the possibility was raised and rejected, in one instance quite categorically. The Ontario Government's Royal Commission Inquiry into Civil Rights ("the McRuer Commission") handed down its first report in 1968 and there expressed the strong opinion that such procedures were not needed in this province. The Report instanced the failure of the British legislation, pointed to the existence in the province of a well-accepted system of informal advance consultation and expressed concern about the potential costs and delays of enacting a general statutory requirement for "notice and comment" procedures.

Federally, a year later the Third Report of the Special Committee on Statutory Instruments ("the MacGuigan Committee") also rejected calls for a provision after the American model. However, this Committee was not nearly so opposed to the idea of formal "notice and comment" requirements as the McRuer Commission had been. The difficulty it saw was the inappropriateness of a general requirement. In some situations, "notice and comment" might be desirable. In others, it might be too inefficient or totally unnecessary and finding no clear way of expressing these concerns in the form of statutory exceptions, the Committee recommended against a general requirement. However, it

did express the view that in future the drafters of legislation should always consider the possibility of imposing a "notice and comment" requirement when creating authority to make subordinate legislation.

Since 1969, things have not stood still in this area. Unlike the situation in the United States, the courts in Canada have not been an agency of reform, save that in the relatively narrow field of highly individualized municipal by-laws (e.g. "spot zoning") they have upheld the right of those directly affected to certain procedural protections before the by-law is made, though generally they have adhered to the old rubric that subordinate "legislative" functions do not carry with them any procedural obligations. While not too much has come out of the courts, the legislatures and the agencies and departments themselves have been far more active. This is most notably true of the federal level in Canada. However, particularly in the last twelve months or so, there are many signs that the province of Ontario is picking up the federal lead.

Even before the MacGuigan Committee reported in 1969, at least two federal statutes provided for "notice and comment"-type procedures and since that time the number of such provisions has increased dramatically. Indeed, in a number of important Bills presently before the federal Parliament, there are "notice and comment" requirements. At the agency and department level there has also been a lot of activity. The Canadian Radio-Television Telecommunications Commission

has been the major example. In relation to both its broadcasting and telecommunications jurisdiction, it has held frequent public hearings and afforded opportunity for comment on proposed policies and procedures. Other major federal boards, such as the Canadian Transport Commission and the National Energy Board, have followed suit. Also, a perusal of recent issues of the Canada Gazette reveals government departments frequently advertizing proposed regulations and giving those interested an opportunity to comment.

In Ontario, the legislature has not shown quite the same initiative as the federal Parliament though in Bill 70, a proposed comprehensive statute on occupational health hazards presently before the Legislative Assembly, there is a requirement of "notice and comment" in relation to the designation of toxic substances. This, in fact, does no more than confirm the present six-month-old practice of the Ministry of Labour which has been giving advance notice in the Ontario Gazette of and an opportunity to comment on regulations governing substances which are occupational health hazards. Also, early in 1979, a proposed new comprehensive set of regulations relating to fire safety and control has been advertized in the Ontario Gazette for the purposes of giving those interested an opportunity to comment. At the agency level, the Ontario Securities Commission has for some time now been advertising in both its Weekly Summary and monthly Bulletin proposed changes in its regulations and policies and is already engaged in public hearings in relation to regulations to be promulgated under the new Securities and Commodity Futures Acts,

enacted in 1978 and scheduled to be proclaimed in force in the spring of this year. Also noteworthy are the current round of public hearings being held by the Ontario Energy Board on the issue of the pricing of energy in the province.

The question raised by all of this activity, indicating acceptance of the worth of "notice and comment" procedures in some contexts for the development of rules and policies, is whether it is now appropriate to reconsider the whole question of the general "notice and comment" requirement. For a number of reasons it is suggested that the answer to that question should be affirmative.

Of greatest significance is the fact that, despite the hopes and aspirations of the McRuer Commission, more and more important legislation and policy is being created outside of the parliamentary arena under subordinate legislation-making powers conferred by primary legislation or under broad mandates for the development of policy within jurisdictions conferred by statute. Not only is this unavoidable in an era of highly complex government but it is also desirable. The legislature has neither the time nor the expertise to do everything. However, the limited capacities of the legislature and the continued movement of real power into the hands of government departments and administrative agencies should not lead to a decrease in the democratic and participatory values that characterize the development of legislation by the Legislative Assembly. Indeed, there should be every endeavour to replicate or replace by adequate

substitutes the devices of legislative debate and committee consideration when legislative power is being exercised by government departments and administrative agencies. After the event scrutiny of regulations by parliamentary committees is obviously not enough, particularly when such committees are mandated to be more concerned with form than substance and when the same problems of lack of time and expertise, as have led to a diminution of the power of the Legislative Assembly itself, are also present. On the other hand, adequate advance advertisement of pending rules and policies and an opportunity for comment and criticism does provide a context for public opinion generally and expert interest particularly to have an impact.

In the United States, little cost benefit analysis appears to have been done on the operation of rule-making procedures. However, by and large, there is a consensus that the procedures imposed by section 553 have provided an extremely valuable adjunct to the functioning of government. A highly organized lobby has ensured that participation is seldom lacking and many agencies have been quick to acknowledge the valuable information that the whole process generates. Indeed, the thrust of most of the debate in the United States, headed by such bodies as the American Bar Association and the august Administrative Conference of the United States, a statutory body consisting of people closely involved with the administrative process, has been in the direction of movement beyond section 553 of the Administrative Procedure Act to more sophisticated procedures for the development of

rules and policies by agencies. In fact, interestingly, this view is shared by the Congressional Committee on Federal Paperwork which in its 1978 report on Rulemaking felt that the paper costs of the "notice and comment" procedures were more than offset by the saving in subsequent paperwork which rules developed without "notice and comment" procedures have a propensity to generate. This suggests, rather dramatically and in contrast to the McRuer Commission Report, that the delay to the regulatory process in having to submit to "notice and comment" procedures is in fact more than compensated for subsequently. Better rules emerge and there is less after the event criticism.

The McRuer Commission's other main argument that the present system of informal consultation is adequate can also be answered. Informal consultation tends to be limited in its reach and there is no guarantee that it involves everyone with an interest in the development of particular rules and policies. One of its obvious dangers is regulatory capture; the domination of the department or agency by the "industry" regulated or a segment thereof when that industry or a segment is the major participant in the consultative process. Indeed, there is a body of evidence that regulated groups in Canada are not nearly so sanguine as the McRuer Commission was about the efficacy of departmental and agency informal consultative practices. The voluntary adoption of "notice and comment" procedures by a number of agencies, both federal and provincial, also suggests

increasing disenchantment on their part with the almost inevitably haphazard nature of informal techniques.

Of course, formalizing the process by the imposition of a "notice and comment" procedure does not guarantee more extensive consultation nor does it necessarily ensure against regulatory capture. However, it does have the undeniable merit of opening up the process to much closer public scrutiny and that in itself has a tendency to reduce abuses. To this extent, there are clear connections between "notice and comment" procedures and freedom of information proposals. Without the chance to use it effectively, public access to the processes and information of government does not mean very much. A "notice and comment" procedure is clearly far more effective in this respect than spasmodic opportunities for electoral choice or after the event criticism of rules and policies. Moreover, there are sufficient analogies between the role of lobbyists in Canada and the United States to suggest that any "notice and comment" process will not fail through want of participants. There is also some merit in linking proposals for the adoption of "notice and comment" procedures with the case for greater public funding of public interest groups involved in the regulatory process so that such groups will not be too over-committed to play an effective role.

The most difficult issue in relation to "notice and comment" procedures has to be the argument that the adoption of such a general requirement would have the effect of encouraging agencies and

departments to abandon attempts at the formulation of rules and policies and to revert to the development of law on an ad hoc basis or in the context of individual adjudications. Some support for not acting is also provided by the fact that some agencies and departments are already moving in this direction voluntarily. Given this fact, it might be said that it is better to allow the procedures to develop by gradual accretion than it is to risk an adverse reaction by imposing a general requirement at this stage.

Here, once again, the United States federal experience provides some guidance. With the exception of the National Labour Relations Board, the major federal regulatory agencies have not been deterred by the "notice and comment" requirement from developing rules and policies. Indeed, this argument, which tended to be made in the United States not in relation to the Act itself but with respect to proposals for the removal of one of the exceptions to the Act, is not now heard that often. For a time, influential commentators were of the view that the removal of the "interpretative rule" and "general statement of policy" exception to section 553 would cause an undesirable falling off in the use of interpretative rules and general statements of policy. Now those same commentators have changed their minds on this issue.

Simply leaving development to the individual agencies and departments also has its costs and dangers. It would undoubtedly be a long time before there was general acceptance of the value of "notice and

comment"-type procedures by all departments and agencies. Also, such a lengthy process of acceptance would involve the waste of individual agency and department consideration and experimentation. If the procedure is perceived as being generally worthwhile, much of this could be avoided by a simple, legislative statement at this time.

On balance, I am persuaded by the American federal experience and by the need to reduce the participatory vacuum, caused by the creation of much law and policy outside of the legislature in government departments and semi-independent agencies, that it is time for the enactment in the province of Ontario of a general "notice and comment" requirement after the basic federal model in the United States. The evidence demonstrates that such a process, rather than creating additional regulatory inefficiency, has a tendency to encourage the development of better rules and policies. At a time when increasing attention is being paid to the functioning of the regulatory process in this province, such a device should commend itself to those concerned with improving our system of government.

Some commentators in the United States have described section 553's "notice and comment" procedure as "obsolescent" and there is a constant search for improved techniques for ensuring effective and efficient participation in the development of rules and policies. However, no clear consensus has yet emerged and all proposals still accept the basic premise of section 553, namely that proposals to make rules should be advertised in advance and there should be an

opportunity to comment at least in writing on those proposals. Also, the simpler that the procedures are initially, the greater is the chance of their being accepted by the departments and agencies. Here again the American experience provides sound evidence of this. Indeed, the lack of any clear consensus about how the basic system needs to be elaborated suggests that perhaps, beyond the basic requirement, increased sophistication should be a matter for consideration by either the legislature, the agencies or, possibly, the courts on an individual tribunal-by-tribunal basis. One thing is also clear. The anxious experimentation with more detailed procedures by Congress and the agencies themselves has demonstrated that the rule-making process should seldom, if ever, be surrounded by all the procedural requirements which attend a court-like adjudication. Indeed, there have been some incredible procedural excesses in situations where Congress has surrounded rule-making by certain agencies with trial-like procedures. The sophistication which is now being sought is really a problem of developing procedural techniques short of adjudicative-type procedures which will improve the "notice and comment" process.

Accordingly, there seems no need at this time to think of anything more for Ontario than the basic minimum prescribed by section 553. Of somewhat greater difficulty, however, is whether all of the exceptions to section 553 need to be retained in an Ontario statute. In the United States, there seems to be general agreement that an exception in relation to public property and government contracts

should disappear and also that there needs to be a considerable contraction of the "foreign policy" exception (in Ontario terms, presumably, "interprovincial policy"). On the other side, there is also a consensus that there has to be an exception for "good cause" situations, such as emergencies, which the department or agency is prepared to justify in writing. This is also found in the Model State Act and would obviously be needed in any Ontario statute as would an exception in relation to certain purely domestic affairs of government departments and agencies. The level of public interest in these matters is so obviously low and the quantity of such rules so numerous as to make the imposition of a "notice and comment" requirement totally inefficient. (On the other hand, there would seem to be no convincing reason why such rules should not be published, or at least publicly available.)

Far more controversial is the "interpretative rule" and "general statement of policy" exception. Because of the obvious impact of many such rules and policies, the fact that they may not be recognized by courts of law as legally binding in the strict sense of the word scarcely detracts at all from their status as de facto law. Presumably, for this reason, the exception is not found in the Model State Act and there is considerable advocacy of at least its modification in section 553 but as yet no clear consensus as to how this is to be achieved. In the Model State Act, problem cases in this area are left to be handled by the "good cause" exception and it is my sense that this should be followed in Ontario. One only has to look at the nature of

the policy statements and interpretative rules developed by a body such as the Ontario Securities Commission and the degree of recognition those rules and policies are given to realize that their exclusion from any "notice and comment" requirement would seriously diminish its impact. Finally, there is also a case to be made for eliminating the exemption for agency and department procedural rules at least insofar as those rules relate to the conduct of proceedings involving the public.

When the McRuer Commission reported in 1968 on this issue, its negative recommendation was based on the notion that substantive rules and policies should not be developed outside the legislature. Ten years have proved that that belief not only fails to reflect present realities but may be quite undesirable anyway. The Ontario of today is far closer to the American system of major policy decisions being made through government departments and independent agencies than it is to the theoretical Westminster model of parliamentary government. Given this fact, it is vitally necessary that alternative methods of public participation in government be explored thoroughly and urgently. In this light, one important procedure that has proven itself both federally and at the state level in the United States is the provision to the public of a formal opportunity to participate in the development by government departments and agencies of rules and policies. Those successes in the United States point clearly to the desirability of creating such a "notice and comment" procedure in the province of Ontario. The paper that follows develops the arguments for this legislative action in greater detail.

CHAPTER I

INTRODUCTION

The major focus of Canadian discussions about procedural fairness has been in the context of what may be termed roughly the statutory "adjudicative" process. Where a statutory authority is charged with making a decision based on facts peculiar or personal to an individual or a group of individuals, when is it appropriate to surround that process with certain procedural protections for the benefit of those affected substantially by the decision? Moreover, in asking and answering this question, distinctions tend to be made between the "legislative" process and the "policy-making administrative" process on the one hand and the "adjudicative" process on the other. Securing recognition that the process fits into the latter rather than the former category has traditionally enhanced dramatically the claim for participatory procedural protections, whether that claim is being advanced before a court of law or as part of a legislative drafting exercise. Indeed, at least as far as the courts of law are concerned, some would argue that the placing of a function in the former category is sufficient in itself to defeat any claim for participatory procedural protections in a situation when the empowering statute is silent.

This paper attempts to reassess those traditional antipathies towards the adoption of formal participatory procedural protections when legislative and policy-making functions are performed by statutory bodies in the province of Ontario. Is there a case to be made for requiring an opportunity for participation by the public and, particularly, those groups which will be affected primarily before regulations or rules are made by the Lieutenant Governor in Council or by a Minister of the Crown or other statutory body, before a department of state or other statutory agency lays down policies to cover future exercises of statutory discretion, or before a department or agency issues interpretative rulings?

Just ten years ago in 1968, in Volume 1 of its first report, the Royal Commission Inquiry into Civil Rights in this province (the "McRuer Commission") rejected summarily the argument that there should be a general requirement for advance publication of proposed regulations so that there could be an opportunity for comment by interested persons. This was not seen

... as a necessary safeguard of the rights of individuals who may be affected. Compulsory antecedent publication and consultation would cause unnecessary delay and merely duplicate the time already spend in informal consultation. 1

This rejection of a general requirement was echoed a year later at the federal level in the 1969 Third Report of the Special Committee

1 (Toronto: Queen's Printer, 1968) at 364.

on Statutory Instruments (the "MacGuigan Committee"), though after a somewhat more detailed consideration of the issue, at least on the face of the written report.² However, the Committee did make a strong recommendation that both those affected and the public at large should in fact be given an opportunity to comment on proposed regulations, even though the Committee was not prepared to recommend that this be generally mandated by law. Further, it was recommended that those involved in drafting regulation-making sections in statutes in future give consideration "to providing for some type of formalized hearing or consultation process where appropriate".³

In all recent Canadian discussions of these issues, the stimulating force has been the "notice and comment" section of the United States federal Administrative Procedure Act which does require administrative agencies to provide advance notification and opportunity for comment when they are engaged in "rule-making", or in our common terminology, the promulgation of regulations or subordinate legislation as well as certain types of policy decisions.⁴ In recent years these procedures

2 (Ottawa: Queen's Printer, 1969) at 43-48. McRuer only gives the subject two and a half pages (id., at 362-364) and does not indicate having done any empirical research, though the well-known English academic, Professor H.W.R. Wade was consulted (at 363). MacGuigan not only heard evidence but also sent out questionnaires trying to elicit some information as to the actual practice of departments and agencies. See 43.

3 Id. at 47-48.

4 Originally section 4 of 60 Stat. 237 (1946). Now Chapter 5 of 5 U.S.C., subsection 553.

and their offspring have attracted wide attention and, from many quarters, near lyrical praise. Indeed, Professor K. C. Davis, in the 1970 Supplement to his Administrative Law Treatise, was moved to entitle a subheading in his chapter on rule-making: "Rule-Making Procedure is One of the Greatest Inventions of Modern Government".⁵ Six years later in Administrative Law of the Seventies he reiterated this claim and continued:

The United States is entering the age of rule-making, and the rest of the world, in governments of all kinds, is likely to follow. The main tool for getting governmental jobs done will be rule-making, authorized by legislative bodies and checked by courts.

6

To dismiss this claim automatically as being too extravagant and as failing to recognize the very different constitutional and administrative arrangements of a country such as Canada is to do a great disservice to one of America's greatest administrative lawyers whose concerns at the comparative level with the problems of other jurisdictions has always been evident. It clearly merits serious consideration. That this is so is also evidenced by the movement towards frequent "policy" hearings at the federal level in Canada by bodies such as the CRTC, the CTC, and the National Energy Board, and also to a lesser extent by some agencies in Ontario. Even more directly pertinent at the federal level in Canada are a number of

5 (St. Paul: West, 1971) at 6.15, 283.

6 (Rochester: The Lawyers' Co-Operative Publishing Co., 1976) at 6.01, 167-68.

recent legislative initiatives requiring "notice and comment" procedures for regulations made under several regulatory statutes and also proposed for pending telecommunications, transportation, atomic energy and competition legislation.

Given these considerations and developments, a number of questions suggest themselves automatically as being immediately relevant for the administrative process in the province of Ontario. Is there a case to be made for a general "notice and comment" requirement for the making of subordinate legislation? If not, are there nevertheless other statutory devices which should be considered as promoting greater consultation before some, if not all, regulations are promulgated? Do the roles of some departments and administrative agencies as propounders of policies and of interpretations outside of the formal regulation-making area also generate claims for mandatory consultative procedures? When participatory procedures are discussed in relation to the rule-making, policy-making and interpretative roles of statutory bodies, how detailed do those procedures need to be? This paper is an attempt to deal with these issues in a preliminary fashion with a view to generating further discussion and perhaps ultimately legislation.

It is divided into four principal sections. In the first, after an attempt to define what is involved in this study, I will discuss present Canadian law on the issue of whether hearings are ever required in relation not only to rule-making in the strict sense of

the word but also policy-formulation and the issuance of interpretative statements. This will encompass a survey of common law, statutes, and actual practice with particular reference to the Ontario and federal positions. As well, in this section, detail will be given as to the procedures in force in Ontario and federally for the promulgation of subordinate legislation under general statutes such as the Ontario Regulations Act,⁷ the federal Statutory Instruments Act⁸ and the Ontario Municipal Act.⁹

The second section will consist of a preliminary analysis of the present Canadian position. Why did the McRuer Commission and the MacGuigan Committee recommend against the imposition of a general hearing requirement with respect to rule-making? Is the reasoning of the McRuer Commission, which accepted that informal devices provide satisfactory input into the administrative process, justifiable? How effective are rule-making procedures used in Canada, particularly at the federal level?

As already noted, the example constantly referred to in arguments for rule-making procedures is the "notice and comment" procedure found in the United States Administrative Procedure Act. The third section of

7 R.S.O. 1970, c. 410.

8 S.C. 1970-71-72, c. 38.

9 R.S.O. 1970, c. 284.

the paper will consist of a reasonably detailed analysis of the Administrative Procedure Act's rule-making provisions in an attempt to analyze their effectiveness. To what statutory authorities does the Act apply? What functions of those statutory authorities are caught by the Act? What indeed is "rule-making"? What exemptions are provided for? What kinds of procedures are in fact required? How have the commentators and those directly affected by the requirements reacted to the APA provisions? To what extent have there been common law and particular statutory accretions to the APA provisions? Why were these felt to be necessary and have they been effective?

In the final section, I will return to the Ontario situation and attempt to relate the American federal practice in this field to the current needs of the administrative process in this province. To what extent would Ontario profit from a general rule-making statute after the model of the APA's "notice and comment" provisions? Of course, to decide against such an Act does not necessarily preclude the imposition of such rule-making procedures on certain administrative agencies and some consideration will be given to this issue also. As well, attention will be paid to the functions of administrative agencies that are candidates for the imposition of "notice and comment" procedures; the extent to which such procedures might need to be stretched beyond the formal statutory instrument having binding legal force to policy statements, informal rules and interpretative bulletins. Another problem is the scope of such procedures. It is very doubtful that, in any situation, the procedures would need to be

as wide as those imposed by Part I of the present Statutory Powers Procedure Act,¹⁰ yet effectiveness may demand the opening-up of the processes of many Ontario administrative agencies and other statutory authorities, and this of course will raise both confidentiality and privacy issues. Finally, in this section, the relationship between rule-making procedures and present procedures for the promulgating of subordinate legislation will be discussed.

Probably the major difficulty in assessing the need for the imposition of rule-making hearings on even some Ontario administrative agencies is how to know whether the end-result of the administrative process would be at all improved by such procedures. Very little cost-benefit analysis of the effect of imposing "notice and comment" requirements has been done in the United States, though some of the excesses of such requirements have caused significant critical comment. We are also living in an era where the whole administrative process is being looked at quite critically in both Canada and the United States. The proponents of "sunset" laws have become as prolific as the advocates of "sunshine" laws.

In the midst of such skepticism, any movement in the direction of further "complicating" the administrative process, of burdening administrative agencies with additional "time consuming" procedures,

10 S.O. 1971, c. 47.

will require a strong justification on the part of those proposing it. One point does, however, need to be made most strongly at the outset. One of the most significant advantages of rule-making, policy statements and the use of interpretative rulings is that they potentially allow those involved in the administrative process to move away from the development of "law" on the basis of case-by-case adjudication to what can, in some situations, be a much more efficient, legislative method of proceeding.¹¹ To the extent that such

- 11 Professor K.C. Davis has been the staunchest United States advocate of the value of this mode of regulation. See e.g. his statement of the advantages of rule-making over adjudication in the 1970 Supplement to the Treatise (*supra*, note 5) at 6.15, 284. In Canada the message has been carried forward principally by Professor H.N. Janisch of the Faculty of Law at the University of Toronto. See, in particular, his article, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada" (1979), 17 O.H.L.J. 46. See, however, Jeff Cowan, "The Discretion of the Director of the Ontario Securities Commission" (1975), 13 O.H.L.J. 735 at 774-76, where he questions the desirability of rule-making by the OSC, preferring instead greater clarity in primary legislation. The McRuer Commission was also very much in favour of doing as much as possible by primary legislation (*infra*, note 222 and accompanying text). For more general discussion on the issue of regulatory discretion and the relative merits of primary legislation, agency rule-making and adjudication, see e.g. K.C. Davis, Discretionary Justice: A Preliminary Inquiry (Baton Rouge: Louisiana State University Press, 1969); H.T. Wilson, "'Discretion' in the Analysis of the Administrative Process" (1972), 10 O.H.L.J. 117; Jeffrey Jowell, "The Legal Control of Administrative Discretion", [1973] Public Law 178; D.J. Galligan, "The Nature and Function of Policies Within Discretionary Power", [1976] Public Law 332; H.L. Molot, "The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion" (1972), 18 McGill L.J. 310; William J. Atkinson, "La discrétion administrative et la mise en oeuvre d'une politique" (1978), 19 C. de d. 187; Steve Wexler, "Discretion: The Unacknowledged Side of Law" (1975), 25 U.T.L.J. 120.

legislative methods are to have credibility because of the wise and generally acceptable results they produce, it may well be vitally necessary to ensure formal, active interest group participation in their development. While that is by no means an empirically-tested judgment, it at least has some justification in the political reality of the continuing demands of many groups for participation in the administrative process and might not be even too far wrong as a hunch as to what produces better outcomes in administrative regulation. If recent developments at the federal level in Canada are any guide, this also seems to be accepted, at least in some contexts, by both the legislature and government departments and agencies.

CHAPTER II

DEFINITIONS

In one of the pioneer and influential articles on the subject of rule-making in the Harvard Law Review in 1938, "Procedure in Administrative Rule-Making", Professor Ralph Fuchs proposes the following definition of rule-making:

... the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations [as distinguished] from the issuance of orders or findings or the taking of action applying to named or specified persons or situations. 12

Earlier, he had rejected as inadequate a definition which distinguished rule-making from other governmental action on the basis that it was forward- or future-looking as opposed to affecting present or past situations.¹³ While it is clear that it is possible to see rule-making as attempting to deal with future eventualities, it is also clear that, in many other instances, governmental action is forward-looking, e.g. the grant of a licence for the next five years. Hence, as a general operating basis Fuchs' definition has much to commend it, particularly when compared to an earlier attempt, by Field, J. of the Supreme Court of the United States, to differentiate

12 (1938), 52 Harv. L. Rev. 259 at 265.

13 Id. at 261-63.

between legislative and judicial acts:

The one determines what the law is, and what the rights of the parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it.

14

In other words, it seems preferable to focus upon not only the forward-looking perspective of subordinate legislative power but also its generality to distinguish it from other governmental functions such as adjudication.

However, that the definition is not totally adequate to cover all situations is quite clear. For example, we all know of regulations issued under formal statutory regulation-making authority which are quite specific in their application to particular individuals.¹⁵ In such a case, all that can be said is that the legislature has chosen to allow certain individually-oriented problems to be dealt with by a rule or regulation. To admit that is not, however, to destroy the usual applicability of the definition. Indeed, the definition may still prove useful in such cases in that, as we shall see shortly, deviation from it may cause the instrument in question to be treated on a special basis by the courts in relation to the possible application of rules of procedural fairness.

14 "Sinking Fund Cases" (Central Pacific Railroad Co. v. Gallatin) (1878), 99 U.S. 700 at 761 (per Field J., dissenting).

15 For example, "spot" zoning by-laws. The issue of hearings and individualized by-laws is discussed infra at 42-46.

The definition may, however, in other respects be over- rather than under-inclusive or perhaps just not explicit enough. The notion of a rule connotes something with legally-binding force, recognizable by a court of law. A rule is to be distinguished from mere interpretations or non-authoritative statements of intended policy. These constitute either expressions of opinion by a government agency as to the meaning of a particular law, or non-binding professions of intention as to how a particular statutory discretion will be exercised in future. Yet even to raise this distinction between what is law or legally binding and what is not, is to open up in this context imponderable questions as to the nature of law.¹⁶

Interpretations and policy statements, while perhaps not legally binding in the sense of having an immediate claim to court recognition, are nevertheless, in very many instances, the "law" of the administrative agency and for all practical purposes that may be the only "law" that counts. As a result, in the United States, not unnaturally, there has been considerable advocacy of the elimination or at least reduction of the interpretative rule and general policy statement exception to the "notice and comment" procedures of the Administrative Procedure Act.¹⁷ The courts have also recognized the effect of such statements by holding that some interpretative rules

16 See notes 20, 309 and 412, infra, for references to some of the extensive American writing in this area.

17 See notes 308-10, infra, and accompanying text.

are subject to "notice and comment" procedures on a common law basis.¹⁸ The practical effects of such interpretative rules and policy statements have also achieved some recognition in Canada in the gradual emergence of a doctrine of estoppel by representation against public authorities.¹⁹

It must also be recognized that the distinction between legally-binding rules on the one hand and mere interpretations, rulings, general policy statements, and adjudication on the other is not necessarily an easy one to draw in practice. While one can confidently assert that a rule or a regulation is a formal legislative act by a subordinate authority acting under a particular legislative direction, as Professor K.C. Davis amply demonstrates in his Administrative Law Treatise, as supplemented, there has been much American judicial activity in this area particularly during the 1970's.²⁰ To a certain extent this may not be such a problem in Canada given the formality attendant upon the making of most regulations and by-laws, the obvious nature of attempts to follow

18 See notes 301 and 303, infra, and accompanying text.

19 For a penetrating discussion of this topic, see P.N. McDonald, "Contradictory Government Action: Estoppel of Statutory Authorities" (1979), 17 O.H.L.J. 160.

20 See K.C. Davis, 1 Administrative Law Treatise (St. Paul: West, 1958), 5.03, 298 ("The Nature of the Distinction Between Interpretative Rules and Legislative Rules") and, generally, 5.03-5.06, 298-330; 1970 Supplement, supra, note 5 at 248-64; Administrative Law of the Seventies, supra, note 6 at 146-65.

those formats and the falling of most formal rule-making procedures into those traditional patterns. Nevertheless, that difficulties can arise here is well-illustrated by the recent, much-criticized Supreme Court of Canada decision in Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board.²¹ This case, in part, concerned the status of "rules, to be known as Commissioner's directives" made by the Commissioner of Penitentiaries under section 29(3) of the Penitentiary Act.²² The issue was important in the mind of the Court because only decisions "required by law to be made" in a

21 (1977), 74 D.L.R. (3d) 1 (S.C.C.). One of the reasons why the distinction gives rise to such problems federally in the United States appears to be that the power to make rules always accompanies discretionary power and need not be separately conferred (see K.C. Davis, 1970 Supplement, *supra*, note 5 at 6.16, 285). This is not the case in Canada where rule-making authority has to be conferred specifically. See W.J. Atkinson, *supra*, note 11 at 205, f.n. 63, referring to R. v. North Coast Air Services Ltd. (1968), 65 D.L.R. (2d) 334 (B.C.C.A.) and North Coast Air Services Ltd. v. Canadian Transport Commission (1968), 69 D.L.R. (2d) 425 (S.C.C.). As a result, there is seldom little problem in distinguishing between a formal use of rule-making power and an "informal" interpretative or policy statement. See, also, René Dussault, 1 Traité de droit administratif (Québec: Les Presses de l'université Laval, 1974) at 712-17 and also 724-34 where he discusses problems of nomenclature and classification of statutorily-authorized rules at some length. In particular, he talks about the type of problem exemplified by Martineau, that of distinguishing between legislative and administrative functions for purposes of characterization of rules. Also Henry L. Molot, "The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion", *supra*, note 11 at 311-17 is informative as is the Second Report to the Commons of the Standing Joint Committee on Regulations and Other Statutory Instruments (See Minutes of Proceedings and Evidence, February 3, 1977, Second Session, 30th Parliament, Issue No. 9 at 29-47).

22 R.S.C. 1970, c. P-6.

certain manner came within the original jurisdiction of the Federal Court of Appeal under section 28 of the Federal Court Act.²³ Eight years earlier, in 1969, the Ontario Court of Appeal had decided that such directives did not involve "an obligation owed by a staff member to the inmate to adhere to" them.²⁴ Such duties were only to be found in the Act itself or the Regulations made by the Governor in Council. In Martineau and Butters this approach was confirmed. In the majority judgment of Pigeon J. the directives were classified as

... no more than directions as to the manner of carrying out their duties [by penitentiary staff] in the administration of the institution where they are employed. 25

As a result, the directives were held not to be "law" and therefore the Federal Court of Appeal lacked jurisdiction. The Court's decision has been criticized strongly by Professor Hudson Janisch for its failure to consider whether the directives come within the ambit of the federal Statutory Instruments Act,²⁶ but that aside, it and the earlier Ontario Court of Appeal decision illustrate dramatically the problems that may arise in determining the legal status of "rules"

23 R.S.C. 1970, c. 10 (2nd Supp.).

24 R. v. Institutional Head of Beaver Creek Correctional Camp, Ex parte McCaud (1969), 2 D.L.R. (3d) 545 (Ont. C.A.) at 553 (per curiam).

25 Supra, note 21 at 10.

26 "What is 'Law'? - Directives of the Commissioner of Penitentiaries and Section 28 of the Federal Court Act - The Tip of the Iceberg of 'Administrative Quasi-Legislation'" (1977), 55 Can. B. Rev. 576 at 579-83. He refers in particular to the definition of "statutory instrument" in section 2(1)(d)(i) of the Act and that of "regulation" in section 2(1)(b)(i).

actually authorized by statute but not conforming to the traditional mould of regulations and by-laws.

Thus it has to be recognized that Fuchs' definition while generally useful does not take account of clear examples of rules which are very precise in their direction or are of a non-binding nature, or of the difficulties involved in distinguishing between those rules of a legally binding kind and those which do not create any legal rights to their observance.

In this regard, it is appropriate to note the broad definition of a rule contained in the definition section of the Administrative Procedure Act:

s. 551(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, and prescribe law or policy or describing the organization, procedure or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting or practices bearing on any of the foregoing.

"Rule-making" is then defined as the "agency process for formulating, amending, or repealing a rule". However, despite the fact that interpretative rules, general statements of policy and rules of agency, organization, procedure and practice are excluded from the application of the "notice and comment" section (section 553), it is easy to see how difficulties might still arise. Defining "rule" to include a statement of "particular applicability" potentially creates difficulties in

distinguishing between rule-making and "adjudication", which is the supposed antithesis of rule-making in the Act.²⁷ Also, the failure to define the three categories of exception is potentially productive of problems. Some of these problems will be returned to later when I discuss the possibility of creating a general rule-making procedure in Ontario.

In Ontario, the Regulations Act provides for certain procedures to be followed for the effective promulgation of subordinate legislation and it defines "regulation" to mean

... a regulation, rule, order, by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council.

28

- 27 Professor K.C. Davis maintains, however, that this has not given rise to problems under the APA. See Treatise (supra, note 20) at 5.02, 294-8:

The words "or particular" were not intended to change into rule making what before the Act was regarded as adjudication. Those words mean no more than that what is otherwise rule making does not become adjudication merely because it applies only to particular parties or to a particular situation.

He then reports in Administrative Law of the Seventies, supra, note 6 at 1.04, 7:

The provision has been read as if the words "or particular" were not included. In no case adjudicated by a federal court have those words caused trouble.

- 28 Supra, note 7, section 1(d).

Certain quite specific exceptions are then set out.²⁹ This definition is subject to difficulties not only generally but also as far as the issue of fair procedures is concerned. What does the term "of a legislative nature" mean? In Re Bedesky and Farm Products Marketing Board of Ontario, the Ontario Divisional Court and Court of Appeal were confronted by a provision entitling a Board to act by

29 These are:

(i) a by-law of a municipality or local board as defined in The Department of Municipal Affairs Act,

(ii) a regulation made under The Broker-Dealers Act, 1947, The Teaching Profession Act, section 78 of The Cemeteries Act or by an authority under section 22 of The Conservation Authorities Act, or a by-law of a hospital made under The Public Hospitals Act, or the constitution and by-laws of an association made under The Agricultural Associations Act,

(iii) an order of the Ontario Municipal Board, other than an order prescribing the rules governing proceedings before the Board,

(iv) an order, direction or designation of the Lieutenant Governor in Council under section 5, 26, 37, 38, 39, 41 or 63 of The Highway Improvement Act, or a designation by the Minister of Highways under section 40 or 85 of that Act,

(v) a schedule of classifications for civil servants, including qualifications, duties and salaries, prescribed under The Public Service Act, or

(vi) an order, approval, regulation, prescription, direction or instruction of the Minister of Municipal Affairs or the Department of Municipal Affairs that the Minister or the Department is empowered to give or make under The Municipal Act or under The Department of Municipal Affairs Act, except clause b of section 12 thereof.

policy statement rather than regulations.³⁰ There the issue was made clear by a specific statement in the Act that such policy statements were to be deemed to be of an "administrative" rather than a "legislative" nature. However, without the "deeming" provision, the courts would have been faced with a classification dilemma, but that aside, whether statutorily-authorized policy statements come within the present definition of regulation or not, does not really help solve the policy problem of whether "notice and comment" procedures should be adopted. In other words, such a definition, depending on the "legislative nature" of regulations, may be of little or no utility on the issue of what, if any, are appropriate functions for the imposition of rule-making procedures of a "notice and comment" or even more formal variety.

The same is true of the much more complicated definitions of "regulation" and "statutory instrument" in the federal equivalent of the Ontario Regulations Act, the Statutory Instruments Act of 1971. "Regulation" is defined here also in terms of "legislative" power.³¹ However, the wider term "statutory instrument" is not so restricted. It names various methods of creating law of general application (rules,

30 (1975), 58 D.L.R. (3d) 484 (Ont. H.C., Div. Ct.) and (1975), 62 D.L.R. (3d) 265 (Ont. C.A.). Leave to appeal to the Supreme Court of Canada was denied (id.).

31 Section 2(b)(i). This may have been problematic if the Supreme Court of Canada had considered whether the Commissioner's Directives were "regulations" in the Martineau case, supra, note 21. See, however, Janisch, supra, note 26 at 581-82.

orders, regulations, etc.) and simply requires that they be expressly authorized by "a power conferred by or under an Act of Parliament".³² Excepted, though, for example, are instruments issued by judicial or quasi-judicial bodies save those relating to practice or procedure.³³ Once again this exemption may not be particularly appropriate for a possible statute creating general rule-making procedures.

In conclusion, the ambit of inquiry in this paper is mainly concerned with the type of activity broadly described in Professor Fuchs' definition. However, in the light of American experience,

32 Section 2(d) (i).

33 The full text of the definition and exceptions is as follows:

(d) "statutory instrument" means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which such instrument relates, or

(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament,

but does not include

(iii) any such instrument issued, made or established by a corporation incorporated by or under an Act of Parliament unless

(cont'd)

consideration will also be given to the problems of procedural fairness in relation to non-binding rules such as interpretative and policy statements, not covered at the present time by the United States Administrative Procedure Act. Attention will also be paid to the Ontario and federal statutes dealing with subordinate legislation to ascertain why they are restricted in their ambit to the instruments as defined and also whether the definitions used there would be at all useful for any general statute that might be proposed for instituting rule-making procedures of a "notice and comment" variety in the province of Ontario.

- 33 (cont'd)
- (A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, or
 - (B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,
 - (iv) any such instrument issued, made or established by a judicial or quasi-judicial body unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament,
 - (v) any such instrument in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto, or
 - (vi) an ordinance of the Yukon Territory or the Northwest Territories or any instrument issued, made or established thereunder.

CHAPTER III

PRESENT ONTARIO AND FEDERAL LAW ON RULE-MAKING PROCEDURES

A. As Imposed by Common Law

1. Regulations and Orders of the Royal Representative in Council

In 1968, the McRuer Commission asserted confidently:

The common law procedural rules of natural justice have never been applied to the exercise of subordinate legislative powers. No notice is required to be given to persons who may be affected by regulations, nor is there any requirement that they should have an opportunity to make representations. Neither is there any common law requirement that publicity should be given to regulations before they are made. 34

As far as regulations or rules made by the Lieutenant Governor in Council in the province of Ontario and federally by the Governor in Council are concerned, that statement was and is still factually

34 Supra, note 1 at 362. Such statements also characterize the leading English texts. See S.A. de Smith, Judicial Review of Administrative Action (London: Stevens, 3rd ed., 1973) at 61, f.n. 20, 163 and 168; H.W.R. Wade, Administrative Law (Oxford: Clarendon Press, 4th ed., 1977) at 482 and 725. Cf. Wade's statements about hearings in relation to policy development, id., at 470-71. See also footnote 85, infra and footnote 230 and accompanying text.

accurate. Indeed, as the recent decision of the Federal Court of Appeal in Inuit Tapirisat v. Léger exemplifies, there are grave difficulties, though not insuperable ones, in arguing for fair procedures from Her Majesty's Representative in Council in any context.³⁵

In the Inuit Tapirisat case, the Federal Court of Appeal held that the plaintiffs had an arguable case that the Governor in Council had to afford some limited procedural decencies in entertaining a petition to vary or rescind an order of the CRTC brought under section 64(1) of the National Transportation Act.³⁶ There is nothing specific in the decision about the possibility of a similar argument being made with respect to the rule-making functions of the Governor in Council. However, the following statement from the judgment of the Court delivered by Le Dain J. is slightly suggestive of that type of argument being feasible:

In this respect the authority conferred by s. 64(1) may be contrasted with the power of the Lieutenant Governor in Council to make Crown grants of land upon "reasonable proof" of certain facts that was held in Wilson v. Esquimalt and Nainaimo Railway Company, [1922] 1 A.C. 202 to be a judicial function. This case does serve to emphasize, however, that there is nothing inherent in the nature and composition of the Executive Government, whether it be the Lieutenant Governor in Council or the Governor in Council, or in its manner of reaching decisions, that makes it impossible or

35 (1978), 24 N.R. 361 (F.C.A.), reversing the judgment of Marceau J. of the Trial Division (1978), 87 D.L.R. (3d) 26 (F.C., T.D.). Leave to appeal to the Supreme Court of Canada has now been granted.

36 R.S.C. 1970, c. N-17.

impracticable to require of it in appropriate cases that
within certain limits it should act judicially or fairly. 37

This statement was coupled with a discussion of the very recent emergence in Canada and recognition by the Supreme Court of Canada of the more flexible concept of a duty to act fairly, a duty which potentially has procedural content for a broader range of statutory bodies than were subject to the traditional rules of natural justice.³⁸

However, at the present time, this does not amount to all that firm a foundation on which to build a prediction of willingness on the part of the Canadian courts to recognize the necessity for procedural decencies when the Royal Representative in Council is making legislative rules. Indeed, the only other suggestion of this argument being made in relation to the Governor in Council that I have been able to find in a Canadian case is a rather oblique statement in the judgment of Heald J. of the Federal Court, Trial Division in

37 Supra, note 35 at 371.

38 Id. at 367-68, where Le Dain J. discusses the judgment of the Supreme Court of Canada in Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police (1978), 23 N.R. 410 (S.C.C.). For other recent Canadian cases on the "duty to act fairly", see Coopers and Lybrand v. Minister of National Revenue (1978), 24 N.R. 163 (S.C.C.); Scott v. Rent Review Commission (1978), 81 D.L.R. (3d) 530 (N.S.S.C., A.D.); Re Alberta Union of Provincial Employees and Alberta Classification Appeal Board (1977), 81 D.L.R. (3d) 184 (Alta. S.C., T.D.); Downing v. Graydon (1978), 21 O.R. (2d) 292 (C.A.); Webb v. Ontario Housing Corporation as yet unreported decision of the Ontario Court of Appeal, delivered December 1978.

Berryland Canning Co. Ltd. v. The Queen.³⁹ This suggests by implication that, if the making of a regulation by the Governor in Council depends upon the existence of objective or adjudicative facts, there may have to be procedural decencies afforded.

To give the word "adulterated" the meaning ascribed by the plaintiff would result in the Governor in Council having to act on a judicial or quasi-judicial basis, that is, before declaring a substance to be adulterated, the Executive Branch would be required to make a finding of fact that the particular substance was, or was not, harmful to humans. 40

Suffice it to say that the Court concluded that the wording of the regulation-making power in the relevant statute ("may make regulations declaring that any food or drug or loss of food or drug is adulterated") did not require such an objective fact determination, nor does it seem that the defendants had argued that the failure of procedural decencies of this kind had caused invalidity.⁴¹

2. Other Statutory Instruments and Binding "Legislative" Orders

Rules made by the Governor or Lieutenant Governor in Council do not, of course, cover the ambit of rule-making or "regulation" or "statutory instrument"-making as defined in the Ontario Regulations

39 (1974), 44 D.L.R. (3d) 568 (F.C., T.D.).

40 Id., at 579.

41 Id., at 577-79.

Act or the federal Statutory Instruments Act, and insofar as the Royal Representative is not involved, one would have thought that the arguments for procedural fairness prior to the making of rules may become stronger.

However, in England that has not proved to be the case with these other kinds of "legislative" instruments, even under the new notion of a duty to act fairly with procedural content. In Bates v. Lord Hailsham, Megarry J., sitting in the Chancery Division of the High Court, was confronted by an attempt to enjoin a committee established under the Solicitors' Act from making an order in relation to the charges solicitors could render for their services.⁴² This was the statutory task of the committee. However, it was alleged by the plaintiff, a member of a group of solicitors, that there had been inadequate opportunity for comment. This argument was rejected in principle by Megarry J. who stated:

In the present case, the committee in question has an entirely different function: it is legislative rather than administrative or executive. The function of the committee is to make or to refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those

42 [1972] 3 All E.R. 1019 (Ch. D.).

affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative body is a commonplace; but although a few statutes have specifically provided for a general process of publishing draft delegated legislative and considering objections ..., I do not know of any implied right to be consulted or make objections, or any principle on which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. 43

This dogmatic rejection of the procedural fairness argument in the context of injunction proceedings, if accepted, seemingly closes the door completely since earlier decisions seem to have established very clearly the unavailability of the prerogative writs of certiorari and prohibition to challenge the validity of legislative acts. A strong High Court of Australia accepted this proposition in 1955 in R. v. Wright, Ex parte Waterside Workers' Federation of Australia⁴⁴ and it was also accepted by Lief J. of the Ontario High Court in 1968 in R. v. Ontario Milk Marketing Board and Milk Commission of Ontario, Ex parte Channel Islands Breeds Milk Producers' Association.⁴⁵

43 Id., at 1023-24. Note, however, that the legislation in issue did require that a draft of the proposed order be sent to the Council of the Law Society for "notice and comment" (id. at 1022). This caused Megarry J. to also rule that this amounted to a legislative code preventing the judicial imposition of additional consultation obligations (id., at 1024).

44 (1955), 93 C.L.R. 528 at 542.

45 (1968), 2 D.L.R. (3d) 346. See also Re Braeside Farms Ltd. and Treasurer of Ontario (1978), 20 O.R. (2d) 541 (H.C., Div. Ct.) reported since the text of this paper was written. Here the Divisional Court rejected an argument that a regulation made by the Minister designating the applicant's lands as being within an
(cont'd)

However, not only are there difficulties in establishing what is "legislative" from what is "administrative" or "executive" in Canadian law but there have also been indications in both Canada and other Commonwealth jurisdictions that, just because the legislative form is used, does not necessarily mean that the rules of natural justice or procedural fairness are excluded.

In this regard the most notable Canadian decision is that of Wiswell v. Metropolitan Corporation of Greater Winnipeg.⁴⁶ Here, the Supreme Court of Canada was concerned with the validity of a by-law of the respondent municipality rezoning a particular piece of land to permit the erection of a multiple family dwelling or highrise. It was alleged by Wiswell, a member of a local homeowners' association, that there had been insufficient notice of the rezoning application. All five judges who sat on the Supreme Court of Canada agreed that the

- 45 (cont'd) area of development control was invalid because of a failure to give a proper hearing. The Court stated (at 546):

The classification of the function of the Minister as either quasi-judicial on one hand or administrative, executive, or legislative (the terms are often treated as synonymous by the authorities) on the other hand, continues to provide, in our jurisdiction, the key to the question of whether a hearing is required.

The Court then went on to hold that as a large tract of land was involved and there was nothing resembling a lis inter partes the Minister was acting legislatively and no hearing was required (id., at 549).

- 46 (1965), 51 D.L.R. (2d) 754 (S.C.C.).

association was entitled to notice and the opportunity to comment.⁴⁷ Even Judson J., who thought adequate notice had been given, was prepared to state that the labels "legislative", "administrative", "judicial" and "quasi-judicial" were not important. What was important was that private rights, in addition to those of the applicant, were being affected and therefore notice was required.⁴⁸

At first blush this might be seen as giving rise to a potentially very wide claim to notice of impending subordinate legislation. In essence, the value of the members' property would be affected by the highrise as would the amenities of life in that neighbourhood. For the Court to see "rights" affected here suggests that all manner of subordinate legislation could be classified as affecting rights and therefore giving rise to a hearing obligation.

However, the leading majority judgment, that of Hall J., suggests a more limited view of the case. He agreed basically⁴⁹ with the approach of Freedman J.A.'s judgment in the Manitoba Court of Appeal⁵⁰ who started off by stating, much as Judson J., that classification

47 See the judgment of Hall J., *id.* at 763-66. Martland J. concurred in this judgment (756) and so basically did Cartwright J. (755) and Spence J. (768).

48 *Id.*, at 757.

49 *Id.*, at 763.

50 (1964), 45 D.L.R. (2d) 348.

ignores the realities and the substance of what is involved in a case like this.⁵¹ Freedman J.A. then continued that this was

... not a by-law of wide or general application ... Rather this was a specific decision made upon a specific application concerned with a specific parcel of land ... Metro was essentially dealing with a dispute ... That Metro resolved the dispute by the device of an amending by-law did indeed give to its proceedings an appearance of a legislative character. But in truth the process in which it was engaged was quasi-judicial in nature; and I feel I must so treat it. 52

As well as citing from Freedman J.A., Hall J. also referred to⁵³ the judgment of the Ontario Court of Appeal in Re Howard and the City of Toronto,⁵⁴ a case involving the validity of a municipal by-law authorizing the expropriation of property for a widening of a lane.

According to Masten J.A.:

In dealing with a proposed by-law which involved a conflict of interest between private individuals who are affected, the council, while exercising discretion vested in it by statute, acts in a quasi-judicial capacity ... 55

This approach on the part of the Supreme Court of Canada exemplifies a point made earlier: when legislation is specific rather than general in its ambit, when it endeavours to deal with a problem not usually associated with legislation, such as a dispute between private individuals, there are justifications for going behind the form of the

51 Id., at 350.

52 Id., at 350-1.

53 Supra, note 46 at 765.

54 [1928] 1 D.L.R. 952.

55 Id., at 956.

legislation and analyzing its real character for such purposes as the operation of the rules of natural justice or procedural fairness.

Indeed, since Wiswell, the courts of Canada have on many occasions applied the rules of natural justice to municipal zoning decisions carried into effect by by-law.⁵⁶ However, in Governors of University of Calgary v. Cormack,⁵⁷ Kirby J. of the Alberta Supreme Court, Trial Division, would not go as far as applying the rules of natural justice to a by-law rendering University lands liable to municipal assessment and taxation where previously there had been immunity.

In this case the City, in enacting this by-law, was acting in a legislative, as distinguished from a quasi-judicial capacity.⁵⁸ He also quoted⁵⁹ from Clement J.A. in Christmas v. City of Edmonton,⁶⁰ a decision of the Alberta Supreme Court, Appeal Division,

56 See e.g. Raes v. Township of Plimpton (1971), 20 D.L.R. (3d) 645 (Ont. C.A.); Re Anzil Construction Ltd. and Township of West Gwillimbury (1971), 19 D.L.R. (3d) 37 (Ont. H.C.); Re Hershoran and City of Windsor (1973), 40 D.L.R. (3d) 171 (Ont. H.C., Div. Ct.), aff'd (1974), 45 D.L.R. (3d) 533 (Ont. C.A.); Re Multi-Malls Inc. and Attorney General of Ontario (1974), 50 D.L.R. (3d) 58 (Ont. H.C., Div. Ct.); Re David and City of Welland (1973), 44 D.L.R. (3d) 29 (Ont. H.C., Div. Ct.); Re Birnamwood Investment Ltd. and Town of Mississauga (1973), 43 D.L.R. (3d) 165 (Ont. H.C.); Re Bourque and Township of Richmond (1978), 87 D.L.R. (3d) 349 (B.C.C.A.).

57 [1971] 3 W.W.R. 226 (Alta. S.C., T.D.).

58 Id. at 235.

59 Id.

60 (1970), 75 W.W.R. 453.

in which it was held that electors did not have to receive notice of a pending municipal resolution to extend a median strip through an intersection, which, it was argued, had the effect of closing a street. According to Clement J.A., to require notice in the case of such by-laws and resolutions would "create a chaos in municipal administration".⁶¹

Thus, it may be that the principle in Wiswell cannot be pressed too far.⁶² Nevertheless, worth noting are three New Zealand decisions cited by the late Professor S.A. de Smith in Judicial Review of Administrative Action.⁶³ These cases suggest the potential for even broader court involvement in "legislative" procedures than emerges from Wiswell.

61 Id., at 457. Contrast, however, Cormack with Re Birnamwood Investment Ltd., supra, note 36, where it was held that a municipality had to act judicially in passing an amending by-law exempting certain lands from a limitation on increases and decreases in municipal taxes.

62 See the judgment of Griffiths J. in Re Braeside Farms Ltd., supra, note 45 at 547-49, in which he reaffirmed Calgary Power Ltd. v. Copithorne (1959), 16 D.L.R. (2d) 241 (S.C.C.) in holding that Wiswell did not apply to all zoning regulations or by-laws. In this respect he disagreed with the statement of Lief J. in Re Multi-Malls Inc. and Attorney General of Ontario, supra, note 56 at 64 that all zoning rules were judicial or quasi-judicial in character and preferred instead the view of the British Columbia Court of Appeal in Re McMartin and the City of Vancouver (1968), 70 D.L.R. (2d) 38 (B.C.C.A.) at 40 that Wiswell "is restricted to orders or by-laws requiring a specific decision to be made by the authority on an application concerned with a specific parcel of land". See also infra, note 103 and accompanying text.

63 Supra, note 34 at 163, f.n. 7.

The first case is the 1923 decision of the Full Court of the Supreme Court in New Zealand Waterside Workers' Industrial Association of Workers v. Frazer.⁶⁴ The case involved an industrial award by the New Zealand Arbitration Court, and though it was not a case in which allegations of breach of the rules of natural justice were being made, the following remarks by the eminent jurist and jurisprude, Sir John Salmond, in relation to whether certiorari and prohibition were appropriate remedies, are instructive:

An industrial award is in form a judicial decree, but in substance it is an act of legislative authority. It is the establishment of a set of authoritative rules regulating an industry, and determining not the present rights and obligations of litigants, but the future relations and mutual rights and obligations of all persons who thereafter during the currency of the award choose to enter into contractual relations with each other as employers and employed in that industry. The making of an industrial award is as much an act of delegated and subordinate legislative authority as the making of by-laws by a municipal authority or by the Board of Trade ... [However] for the purpose of certiorari an industrial award must be taken to be what it professes to be -- namely the exercise of judicial authority by a court of judicature. This is the form which has been given to it by the Legislature, and the intention of the Legislature must be taken to be that the incidents of an award must be those appropriate to a judicial act, and not those appropriate to the exercise of subordinate legislative authority.

65

In other words, in the converse situation of Wiswell, where a ruling was judicial in form and legislative in substance, the court was prepared to hold that the remedies appropriate for reviewing adjudicatory-type proceedings were still available.

64 [1924] N.Z.L.R. 689 (S.C., Full Court).

65 Id. at 709-10.

More importantly, this principle was taken one, possibly two, steps further in the later cases of F.E. Jackson and Co. Ltd. v. Price Tribunal (No. 2)⁶⁶ and New Zealand United Licenced Victuallers' Association of Employers v. Price Tribunal.⁶⁷ In the first of these, a 1958 decision of a single judge of the Supreme Court, certiorari was being sought to quash a general Price Order of the Tribunal because of the Tribunal's failure to give a proper hearing to the applicant, a general merchant in the business of importing and selling hardware and who was affected financially by the Order. Hutchison J., after noting that the Order was not only legislative in form but also substance, was nevertheless prepared to extend the Frazer case to support the applicant's argument for a hearing.⁶⁸ He did so on the basis of statutory indicia that the Price Tribunal was obliged to act in a judicial manner -- the well-known "trappings" test. This basic premise seemed to be accepted by the New Zealand Court of Appeal in the second case, a 1957 decision involving the Price Tribunal,⁶⁹ though this time acting in a somewhat different capacity under another section to set the retail price of draught beer sold for consumption off licensed premises.

66 [1950] N.Z.L.R. 433.

67 [1957] N.Z.L.R. 167 (S.C. and C.A.).

68 Supra, note 66 at 448-52.

69 Supra, note 66 at 204-05 (per Cooke J., with whom North J. concurred (at 207)). See, however, 210-13 where Turner J. looked for something beyond legislative "trappings" to support his judgment.

However, despite the apparent width of these judgments, several cautions must be entered against taking them too far. First, the "trappings" in the Act were rather clear.⁷⁰ Secondly, in the Jackson case, Hutchison J. only upheld the applicant's right to be heard by the Tribunal as to the effect of the Order on his own trading position. He denied him any right to be heard on the much broader issue of the effect of the Order on the national revenue, and doubted whether he could claim to be heard on the issue of the effect of the award on employment in the hardware distribution trade in which he carried on his business.⁷¹ This was picked up by one of the majority judges in the later decision, the Licensed Victuallers' case. Turner J. expressed the strong conviction that he was not going so far as to hold that all consumers had achieved a right to be heard and he stressed "the delays and difficulties that would be entailed by hearing all those affected".⁷² Thirdly, the same judge placed much emphasis on the fact that the Order under challenge in this case came out of the conduct of an application to the Tribunal initiated by the applicants for relief, suggesting that the result might have been different if the Order had been independently issued by the Tribunal

70 The legislation created a Tribunal which held "sittings" and "heard" "cases" generally in public. See e.g. the judgment of Turner J., id., at 210-11.

71 Supra, note 66 at 452-53.

72 Supra, note 67 at 213-14.

as it was entitled to do under the relevant section.⁷³ Fourthly, in the Licensed Victuallers' case, Cooke J. (with whom North J. concurred) stated that he was not going as far as stating that the Price Tribunal always had to act judicially in making Orders⁷⁴ and he noted that, in Jackson, the applicant had based his argument for a public hearing on the fact that he had a special case dissociated from all others in the hardware importing business.⁷⁵

Thus, in effect, the two later New Zealand cases, while perhaps going somewhat further than Wiswell in that they applied natural justice requirements to an order which was legislative in both form and substance, nevertheless seemed to depend on both strong "trappings" or indicia of the necessity for a hearing in the Act and the peculiar effects of the legislative order upon particular individuals. The categories of person entitled to claim protection were in each case quite limited, and in Jackson at least, the scope of the hearing was circumscribed severely.

In summary, once one moves away from the area of rules made by the Lieutenant Governor or Governor in Council, the opportunities for arguing for a hearing in rule-making situations increase somewhat.

73 Id., at 214.

74 Id., at 206-07.

75 Id., at 206.

This is particularly so if the rule can be classified as adjudicative rather than legislative in substance despite its form. Nevertheless, it is significant that in England, notwithstanding the emergence of the more liberal, procedural fairness doctrine, at least one eminent judge has not been prepared to see the need for such fairness where the rule is legislative in substance.⁷⁶ Against this, all that can be raised are a couple of 1950's New Zealand decisions based on very particular facts.

3. Administrative or Executive Rules and Orders, Policy Statements and Interpretations

Is the picture any different when one moves away from legislative rules, as defined somewhat ambiguously by the Canadian courts, to administrative or executive action that might be seen as coming within a broader definition of rule or rule-making; for example, policy statements or the issuance of interpretative rulings? Does it matter whether the administrative or executive action in question has legally binding force or is simply advisory?

76 In *Bates v. Lord Hailsham*, *supra*, note 63, Megarry J. clearly accepted the new fairness doctrine but would not apply it to "legislative" action.

As far as the English courts are concerned, the significant decision is that of the Court of Appeal in R. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association.⁷⁷ This concerned a policy decision taken by the respondent Corporation to increase from three hundred the number of taxi licences in the City of Liverpool. Lord Denning M.R. held that it was the duty of the Corporation to hear those whose interests would be affected by such a decision before it was taken, and this included the applicant Association whose members would be financially prejudiced.

They may be said to be exercising an administrative function.
But even so, in our modern approach, they must act fairly;
and the court will see that they do. 78

Subsequently, this argument was raised in a Canadian case: Rothmans of Pall Mall Ltd. v. Minister of National Revenue (No. 1),⁷⁹ a judgment of the Federal Court of Appeal, delivered, perhaps significantly, by Le Dain J., the judge who delivered the decision of that Court in the Inuit Tapirisat case, discussed earlier. The case involved an interpretation by the Department of the term "cigarette" for Excise Tax purposes. Basically, it was a question of whether the filter should be included in the measurement or not, and as a result of representations by two tobacco companies, the definition was changed. The applicant company claimed that it should have been given

77 [1972] 2 All E.R. 589 (C.A.).

78 Id., at 594.

79 (1976), 67 D.L.R. (3d) 505 (F.C.A.).

notice of this and an opportunity to comment because the decision affected its competitive position in relation to the other companies.

The Court of Appeal held that the applicant was not directly affected by the decision in a way that could be recognized by the Court and tended to make light of the competitive position argument.⁸⁰ Le Dain J. also stated that:

I know of no authority which supports a general duty, when considering a change in administrative policy to be applied in individual cases, to notify and offer anyone who may be interested an opportunity to make representations. 81

He then went on to distinguish the Liverpool Corporation case on the basis that the other two judges besides Lord Denning M.R. had based their judgments on the fact that the Association had previously received an undertaking that the number of licences would not be increased, at least without the Association being given an opportunity to comment.⁸² Not only had no such undertaking been given here but there was no practice of soliciting industry comments on such matters which would create a reasonable expectation of consultation in all such cases, nor had the applicant company previously made any representations in relation to the interpretation of the section.

80 Id., at 509-10.

81 Id.

82 Id., at 510-12, referring at 512 to the judgments of Roskill L.J. and Sir Gordon Willmer.

It is perhaps somewhat unfair to interpret the other judgments in the Liverpool Corporation case as so strongly depending on the making of the undertaking. Certainly, at one point, Roskill L.J. does seem to indicate that he is not intending to lay down a general principle about the need for a hearing on such cases.⁸³ However, he talks generally about the usefulness of such representations to the Corporation and the need for "due and fair regard to all the conflicting interests".⁸⁴ Also the following statement indicates that he probably thought that the Corporation owed procedural fairness obligations to a wider group than the Association, to which alone the undertaking had been given:

The council must make up its own mind what policy it wishes to follow; but before doing so it must act fairly to all concerned, to present licensees and to would be licensees and to others also who may be interested. 85

Nevertheless, whatever the appropriate interpretation of the Liverpool Corporation case, what does emerge clearly from the Rothmans' decision is antipathy on the part of the Federal Court of Appeal

83 Supra, note 77 at 596.

84 Id.

85 Id., at 597. Note the comment of J.M. Evans, "The Duty to Act Fairly" (1973), 36 Mod L. Rev. 93 at 97 where he contrasts this decision with Bates v. Lord Hailsham:

It seems rather odd to require a hearing before a body formulates non-statutory policy guidelines although there is no common law duty to consult before a statutory rule-making power is exercised.

See also footnote 230, infra. and accompanying text.

towards the concept of fair procedure in rule-making, at least where that rule-making takes the form of a non-binding, interpretative statement by a minister of a government department. Whether that attitude would be at all influenced, as Le Dain J. was later to be in the Inuit Tapirisat case, by the subsequent acceptance by the Supreme Court of Canada of the "duty to act fairly" with procedural content can only be a matter of conjecture.

However, even in the area of statutorily-authorized policy statements, the limited experience, at least until recently, has not been encouraging. In the case of Re Bedesky, discussed earlier, the Ontario Divisional Court, in a decision affirmed by the Court of Appeal, held that there was no authority to support the proposition that the rules of natural justice applied to the formulation of a statutorily-authorized quota policy which was expressed in the empowering statute to be of an administrative nature.⁸⁶

Possibly of great significance, though, is the decision of the Supreme Court of Canada in Capital Cities Communications Inc. v. Canadian Radio-Television Commission delivered in late 1977.⁸⁷ One of the

86 Supra, note 30, particularly at 58 D.L.R. (3d) at 507-08 (per Morden J.). Note, however, Re Michelin Tires Manufacturing Ltd. (1975), 72 D.L.R. (3d) 590 (N.S.S.C., A.D.), in which the court "struck down" an interpretative bulletin which had not been publicized effectively. This not only suggests a recognition of the "legal" status of such bulletins but also that their effectiveness may depend on after-the-event if not prior notification. See H.N. Janisch, "Secret Law Condemned" (1976), 3 Nova Scotia Law News, No. 2 at 19; David J. Mullan, "Recent Developments in Nova Scotian Administrative Law" (1978), 4 Dalhousie L.J. 468 at 551-57.

87 (1977), 81 D.L.R. (3d) 609 (S.C.C.).

many issues in this complex case was whether the CRTC exceeded its jurisdiction in basing its decision on a policy statement rather than on a law or regulation. It was argued that the Commission had to act, if it did at all, in relation to program content and advertising on cable television by regulation.

After acknowledging that if regulations had been made they would have prevailed,⁸⁸ Laskin C.J.C., delivering the majority judgment, went on to consider whether the Commission had the choice of either acting on a case-by-case basis or by regulation but not by policy statement. This he rejected categorically in a decision that has been praised by Professor Janisch as opening up the Canadian regulatory system to an era of rule-making.⁸⁹ To quote from Laskin C.J.C.'s judgment:

An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

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Earlier he stated that "it was eminently proper that it lay down guidelines from time to time".⁹¹

88 Id., at 629.

89 Supra, note 11 at 96-98. See, however, Brandt Dairy Co. Ltd. v. Milk Commission of Ontario, [1973] S.C.R. 131 and Canadian Institute of Public Real Estate Companies v. Corporation of City of Toronto (1978), 25 N.R. 108 (S.C.C.), for two instances of the Supreme Court striking down subordinate legislation which simply passed on the power delegated to another instead of actually formulating rules on the subject in question.

90 Supra, note 87 at 629.

91 Id.

Professor Janisch's praise for the decision results from the Court's rejection of an inhibiting series of English decisions which have traditionally been taken to indicate that laying down a policy in advance is only sustainable if it is open to full scrutiny, challenge and reconsideration in any particular case in which the matter is raised. Whether that contributes to a new era of advance policy and rule-making by Canadian administrative authorities remains to be seen. What is of significance, however, for present purposes, is the emphasis which Laskin C.J.C. placed in his judgment on the fact that

[t]he guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions.

92

Here, at least, is some suggestion that the validity of such policies or, perhaps more accurately, their ability to be applied routinely in particular cases, may very well depend upon the degree of consultation and hearing of interested parties that has taken place before the policy is finally formulated. If so, the Capital Cities case may not only herald a new era of rule-making by Canadian administrative agencies but also common law inspired rule-making procedures.

However, as in all other areas where the development of rule-making procedures by the common law route has been raised as a possibility, caution is necessary. On what may be no more than a passing comment of the Chief Justice, too much reliance should not be placed.

Nevertheless, there are other signs of judicial movement. The opening up of the law of standing by the Courts may conceivably have the spin-off effect of leading the courts to require fair procedures for the benefit of those affected by policies and now recognized by the courts as having status to seek judicial review of decisions on such substantive grounds as excess of jurisdiction and abuse of discretion. For example, in Re Doctors' Hospital and Minister of Health, Cory J., delivering the judgment of the Divisional Court, held that both the Hospital and the doctors working at it had status to challenge the Minister's decision to close it as part of an overall policy of economic rationalization of hospital services in the province.⁹³ Though ultimately the issue did not have to be decided, it may well be that this identification of the doctors' interest would have led the judge to hold that the doctors had to be heard before the policy was finalized. On the question of policy hearings, the Ontario Court of Appeal has recently upheld a decision of the Divisional Court that the OMB was obliged to listen to evidence and arguments about a non-binding policy decision of the Ontario Treasurer which the OMB had taken into account in its decision.⁹⁴ However, unlike the Divisional Court, the Court

93 (1976), 68 D.L.R. (3d) 220 (Ont. H.C., Div. Ct.) at 232. See, however, Rothmans of Pall Mall, *supra*, note 79 and Rosenberg v. Grand River Conservation Authority (1975), 61 D.L.R. (3d) 643 (Ont. H.C.), *aff'd* (1976), 69 D.L.R. (3d) 384 (Ont. C.A.); Re Robertson and Niagara South Board of Education (1974), 41 D.L.R. (3d) 57 (Ont. H.C., Div. Ct.) at 58 where a much stricter test for standing to challenge administrative action was adhered to by the courts.

94 Corporation of Township of Innisfil v. Corporation of Township of Vespra, as yet unreported decision of the Ontario Court of Appeal, delivered: December 20, 1978, *aff'g* (in part) Township of Innisfil v. City of Barrie (No. 2) (1978), 7 O.M.B.R. 233 (Ont. H.C., Div. Ct.). (Leave has been granted to appeal this decision to the Supreme Court of Canada.)

of Appeal was of the view that neither the Treasurer nor ministry officials were subject to cross-examination on the fairness or merits of the policy.⁹⁵ Nevertheless, some accretion to procedural rights seems to have been achieved.

How far these decisions and possibilities can be taken is, however, another matter. Suffice it to say, that if there is a case to be made for the imposition of general rule-making procedures in the province of Ontario, too much reliance should not be placed on the present potential of the common law. The signs are few and developments may well be extremely slow. Also, as Laskin C.J.C. suggested in relation to CRIC policies, the incremental development of law on the case-by-case basis is not always the best method of proceeding. Acting to adopt rule-making procedures through legislation may not only achieve desired results much more quickly and at less cost to the system and those involved in it but also, because of the ability of legislators to consider the problem from a broader perspective than courts are normally capable of, the end-result may be much more satisfactory. Much of the balance of this study will be concerned with endeavouring to discern whether it is indeed the case that a rule-making procedures statute would be a desirable development in the province.

95 See the memorandum judgment of Lacourciere J.A. (with whom Howland C.J.O. and Jessup J.A. concurred) at 15-23. Houlden J.A. also concurred on this issue. However, Blair J.A. shared the view of the Divisional Court that cross-examination should be allowed (*id.*, at 45-51). This aspect of the issue is commented on by Janisch, *supra*, note 11 at 75-78.

4. Content of "Rule-Making" Procedures
Imposed by the Common Law

One final point does, however, merit consideration before I move on to the issues of statutory and informal recognition of rule-making procedures under Ontario and federal law. This is the question of the content of procedures that the courts have felt were necessary to protect affected interests in those few "rule-making" cases where procedures were held to be required, an issue tended to be skirted in my general survey of whether there were any circumstances in which rule-making, either formal or informal, demanded some procedures.

In fact only four specific cases were identified in which procedures were felt to be necessary: Wiswell, though there have been many spinoffs from this; the two New Zealand decisions, F.E. Jackson and the Licensed Victuallers' Association case; and finally, the Liverpool Taxi case. However, in addition, the Inuit Tapirisat case may provide some clue as to the possible thinking of future courts or possible legislative solutions when a rule of the Royal Representative in Council is in issue.

In point of fact there is very little of use on this issue in the five decisions just mentioned. In Wiswell, the courts were concerned solely with the issue of the adequacy of notice of a public hearing and held that the Association, because of its known interest in the matter, was entitled to be sent information about the impending hearing and that

newspaper advertisements were not enough.⁹⁶ In the Licensed Victuallers' case, the New Zealand Court of Appeal was merely asked the question as to whether the Association was entitled to "a hearing of some sort" and in answering affirmatively, the majority of the Court did not go beyond that.⁹⁷ Hutchison J., in the earlier decision of Jackson, had been somewhat more forthcoming, seeming to suggest that as the matter had been dealt with in other respects by public hearing, the applicant had a right to put forward his evidence at a public sitting of the Board.⁹⁸ However, no details were spelled out as to the precise procedures at such a hearing and as noted already, the Court expressed a very limited view as to the matters he could raise. Finally, not much is gleaned from the English Court of Appeal decision in the Liverpool Taxi case. Both Lord Denning M.R. and Sir Gordon Willmer spoke simply of an obligation to "hear",⁹⁹ and though Roskill L.J. spoke somewhat more precisely of a duty to give notice to the Association and to hear representations from it,¹⁰⁰ this scarcely amounts to any kind of detailed prescription of procedure.

96 Supra, note 46 at 763-74 (per Hall J.).

97 Supra, note 67 at 205 (per Cooke J.) and 208 (per Turner J.).

98 Supra, note 66 at 452-53.

99 Supra, note 77 at 594 (per Lord Denning M.R.) and 599 (per Sir Gordon Willmer).

100 Id., at 596-97.

The same is also largely true of the Canadian decisions which built upon the foundation provided by Wiswell. These are all decisions in which the by-laws of municipalities were directed at specific pieces of land or particular areas, and in which the courts were prepared to say, because of that specificity and the effects on the property owners in question, that some procedures were necessary. In the 1971 Ontario Court of Appeal decision in Raes v. Township of Plimpton, Aylesworth J.A., delivering the judgment of the Court, held that the applicant was "entitled to notice and entitled to have a full hearing with respect to the subject matter of the amending by-law".¹⁰¹ Similarly, Lief J., speaking for the Divisional Court in a 1974 decision quashing a zoning by-law, Re Multi-Malls Inc. and Attorney-General for Ontario, stated that "notice of intention to pass such a by-law together with an opportunity to be heard should be given to interested parties".¹⁰²

Despite the lack of precision in these statements, it is to be expected that the type of hearing required in such cases would be of the regular adjudicative type exemplified by the provisions of Part I of the Ontario Statutory Powers Procedure Act. The use of the qualifying adjective "full" by Aylesworth J.A. suggests as much. Nor is this at all surprising given that in most of these cases the courts have been

101 Supra, note 56 at 647.

102 Supra, note 57 at 67.

concerned not with broad policy decisions affecting a vast range of people but rather individualized municipal decisions having, as in Wiswell, many of the characteristics of a lis or contest between two distinct interests. The argument, of course, becomes weaker insofar as many zoning decisions are not so confined in the range of interests affected, and if Wiswell does apply to all zoning decisions, as suggested in Multi Malls Inc.,¹⁰³ then the nature of the hearing required may be modified considerably.

Significantly, section 3(2)(h) of the Ontario Statutory Powers Procedure Act excludes the application of Part I of the Act (that establishing a minimum code of procedure) from proceedings.

... of a tribunal empowered to make regulations, rules or by-laws insofar as its power to make regulations, rules or bylaws is concerned.

However, in Re Hershoran and City of Windsor, Hughes J., delivering the judgment of the Divisional Court, held that this did not prevent the application of the rules of natural justice to by-law making on a common law basis.¹⁰⁴ He may also have gone as far as to suggest that section 3 was a type of privative clause not applying where the error was jurisdictional, such as breach of the rules of natural justice, and that in such a case, the provisions of Part I would be

103 Id., at 64 and 67. See, however, note 62, supra, and accompanying text.

104 Supra, note 56, 40 D.L.R. (3d) at 191-92.

invoked.¹⁰⁵ However, the particular portion of his judgment is difficult to comprehend or justify if it indeed goes that far. On appeal, the Court of Appeal did, however, affirm the decision "for the reasons stated" by Hughes J.¹⁰⁶ For the meantime then, this issue must remain clouded.

Of perhaps more value, despite the fact that it is not a rule-making case, is the Inuit Tapirisat decision. According to Le Dain J., the duty to act fairly does not impose on the Cabinet

... any particular manner of considering a petition or appeal, any particular limits to the right to consult, or any particular duty of disclosure with respect to intra-government submissions. 107

As a result, he did not find it necessary for Cabinet to disclose the CRTC's submission in the matter nor did he think it was a matter of complaint that the Cabinet may only have considered a summary of the petitioner's brief. However, he was prepared to hold that depending upon its nature the petitioner may well have been entitled to be given "a reasonable opportunity to reply" to Bell Canada's submission.¹⁰⁸

105 Id., at 192. See J.M. Evans, "Judicial Review in Ontario -- Some Problems of Pouring Old Wine Into New Bottles" (1977), 55 Can. B. Rev. 148 at 158, n. 37 for a discussion of this.

106 Supra, note 56, 45 D.L.R. (3d) at 534.

107 Supra, note 35 at 372.

108 Id., at 373.

This has two potential lessons for the development of rule-making procedures through the common law route. First, the courts are going to be very wary of imposing any particular procedures on the Cabinet when it is considering regulations placed before it for promulgation. Indeed, this is not unexpected given the manner in which Cabinet has functioned generally under the Canadian constitution.^{108a} What it does emphasize, however, is that either in the courts or through the legislative process, attention should be focused upon procedures at the drafting stage before the matter goes to Cabinet in the case of rules either made by the Royal Representative in Council or requiring the approval of that body.

The second point of interest in the Inuit Tapirisat case is the Court's ready acceptance of the fact that the CRTC's advice to Cabinet did not have to be revealed. The fact that Le Dain J. was so easily able to

108a I say generally because as the Inuit Tapirisat case itself demonstrates, Cabinets have exercised adjudicative-type roles in this country which either by custom, statutory direction or judicial pronouncement have involved hearing-type procedures. See Le Dain J.'s discussion (*id.*, at 370-71) of Wilson v. Esquimalt and Nanaimo Railway Co., [1922] 1 A.C. 202; Border Cities Press Club v. Attorney-General of Ontario, [1955] 1 D.L.R. 404 and decisions involving the procedures followed by Cabinet in hearing appeals from the former Board of Railway Commissioners. See also sections 11 and 12 of the Foreign Investment Review Act, S.C. 1973-74, c. 46. Historically, the legislature itself has also, of course, from time to time exercised adjudicative-type roles or adopted hearing-type procedures, the most pertinent of which for present purposes is undoubtedly the procedures adopted in relation to the enactment of private bills (See C.K. Allen, Law and Orders (London: Stevens and Sons, 3rd ed., 1965) at 76).

equate the CRIC's submission with the submissions of other intra-governmental sources says something about the uneasy position of regulatory agencies in this country when compared with the legally more independent position of the equivalents in the United States. However, that aside, it also suggests problems that may have to be given serious consideration if general rule-making procedures are contemplated in Canada. To what extent would such procedures require that government departments initially responsible for drafting rules have to reveal their ultimate views on those rules before submission to Cabinet? Should concern for the secrecy of Cabinet deliberation lead to a continuation of the principle that in all matters, the Cabinet is entitled to confidential advice from the departments of state? To what extent would that, if accepted, justify the inclusion of factual material not previously revealed to interested parties in the submission to Cabinet? These problems are all ones that will be returned to in a subsequent part of this paper.

In conclusion, on the question of the content of rule-making procedures, it has to be acknowledged that those few courts in Canada and in the parts of the Commonwealth that have been prepared to recognize the necessity for some procedures in certain circumstances have done little to contribute to a body of jurisprudence on the precise nature of those procedures. This is not, of course, a matter of criticism. In most of the cases the precise content of procedures was not a problem and generally there has been too little exposure to the issue to expect anything of a developed, sophisticated nature.

B. As Imposed by Statute

1. "Notice and Comment" or Hearing Requirements

In 1969 the MacGuigan Committee reported that it had been able to find only two Canadian statutes which required formalized consultation or a hearing before regulations were promulgated and these remain on the statute books today.¹⁰⁹ The first, and undoubtedly more significant, is section 16(2) of the Broadcasting Act which requires the CRIC, before making regulations in relation to broadcasting licences, to publish a copy of each such regulation (including amendments) in the Canada Gazette and that

... a reasonable opportunity shall be afforded to licensees and other interested persons to make representations with respect thereto. 110

The second example found by the Committee was in the Grain Futures Act and provided that, before the Board of Grain Commissioners, with the approval of the Governor in Council, made any regulations in relation to trading on the Winnipeg Grain Exchange,

... notice thereof shall be given to the Winnipeg Grain Exchange and the Winnipeg Grain and Produce Exchange Clearing Association Ltd., and each of the said Associations or any

109 Supra, note 2 at 43.

110 R.S.C. 1970, c. B-11.

members thereof shall be given an opportunity to be heard
in connection therewith. 111

Since then, quite a number of statutes in varying fields have in fact provided for basically the same kind of "notice and comment" procedures as laid down in the Broadcasting Act. They include the Clean Air Act,¹¹² the Environmental Contaminants Act,¹¹³ the Motor Vehicle Safety Act,¹¹⁴ the Federal Court Act (with respect to rules of Court),¹¹⁵ the Pilotage Act (with respect to both pilotage tariffs and regular regulations)¹¹⁶ and the Radiation Emitting Devices Act.¹¹⁷ Also five recent important Bills, not yet law, require "notice and comment" procedures before the promulgation of regulations. The five Bills are:

1) The Telecommunications Bill, which consolidates the jurisdiction of the CRTC. As well as continuing the present provision with respect

111 R.S.C. 1970, c. G-17, section 5(2). See also section 330 of the Railway Act, R.S.C. 1970, c. R-2, inserted by S.C. 1969, c. 69, s. 70, by virtue of which the CTC is subject to "notice and comment" procedures in relation to regulations related to costs determinations, though the opportunity to make submissions and request a hearing is confined to "any transportation company, organization, provincial authority or municipal authority" (subs. 2).

112 S.C. 1970-71-72, c. 47, section 7(2).

113 S.C. 1974-75-76, c. 72, section 5(2), (3).

114 R.S.C. 1970, c. 26, 1st Supp., section 9.

115 R.S.C. 1970, c. 10, 2nd Supp., section 46(4).

116 R.S.C. 1970-71-72, c. 52, sections 23 and 14(3).

117 R.S.C. 1970, c. 34, 1st Supp., section 11(2).

to regulations on broadcast licensing, it extends the "notice and comment" procedure to regulations to be made by the Executive Committee of the CRTC in relation to telecommunication rate-setting.¹¹⁸

2) The National Transportation Bill, which applies the "notice and comment" procedure to certain rate-setting regulation-making of the CTC.¹¹⁹

3) The Competition Bill in which the Governor in Council is obliged to follow the "notice and comment" procedure in relation to making regulations about the conduct of class actions under the Act.¹²⁰

4) The Transportation of Dangerous Goods Bill which also requires the Governor in Council to adhere to a "notice and comment" procedure in promulgating regulations.¹²¹

5) The Nuclear Control and Administration Bill. This establishes a new regulatory body, the Nuclear Control Board, as part of a revamping of the regulatory scheme for atomic energy in Canada. Under the Bill, the new Board is given extensive regulation-making power and in exercising that power is subject to the identical procedures imposed in the other four pieces of impending legislation.¹²²

118 4th Session, 30th Parliament, Bill C-16, section 61(2), (3).

119 4th Session, 30th Parliament, Bill C-20, section 278.1 (2), (3).

120 3rd Session, 30th Parliament, Bill C-13, section 39.2 (2), (3).

121 4th Session, 30th Parliament, Bill C-17, section 18.

122 3rd Session, 30th Parliament, Bill C-14, section 56(2), (3).

Interestingly, in each case there is a new, additional provision to the effect that the "notice and comment" procedures do not apply to any regulations revised as a result of representations by interested persons.¹²³

What this acceptance of "notice and comment" procedures in relation to these quite diverse regulations seems to indicate is a greater and growing commitment on the part of legislators at the federal level to the appropriateness of more formal consultation involving potentially the general public as well as those most directly interested. This follows the recommendations of the MacGuigan Committee which urged the consideration of the need for "notice and comment" procedures in particular regulatory situations,¹²⁴ but the sense of that Committee that a general requirement for such procedures was unnecessary is also reflected in the fact that many Acts have been enacted since that time without such procedures being attached to the regulation-making power.¹²⁵

When the MacGuigan Committee talked about only being able to find two Canadian examples of such procedures, it is a little difficult to know

123 See e.g. id., section 56(3).

124 Supra, note 2 at 48.

125 See e.g. Canadian Human Rights Act, S.C. 1976-77, c. 33, sections 23, 29, 62; Immigration Act, S.C. 1976-77, c. 52, section 115; Canadian Wheat Board Act, S.C. 1976-77, c. 56, section 33.21.

whether the Committee was speaking solely about federal legislation or whether it intended to include provincial legislation as well. Whatever the case, it is clear that the position is little or no different at the provincial level. Instances can be found in the statute books of the provinces whereby a hearing is required before the promulgation of regulations. For example, section 60(1) of the British Columbia Workmen's Compensation Act of 1968 provides that before the Workmen's Compensation Board makes regulations "a public hearing shall be held", notice of which has already been given in local newspapers.¹²⁶ However, this is certainly not common.

Professor F.A. Laux, in his casebook on The Administrative Process,¹²⁷ cites two Alberta statutes where, in one case, the Labour Relations Board is given authority to fix minimum wages "[a]fter such inquiry as the Board considers adequate",¹²⁸ and in the other, public hearings are required under the Planning Act in relation to zoning by-laws.¹²⁹ There are no exact Ontario equivalents, though the structure of the planning process in Ontario, with the supervisory judicial role of the

126 S.B.C. 1968, c. 59.

127 (Edmonton: Faculty of Law, University of Alberta, 3rd ed., 1975) at 72.

128 Alberta Labour Act, S.A. 1973, c. 33 section 24(1).

129 Planning Act, R.S.A. 1970, c. 276, section 130.

Ontario Municipal Board, ensures that there is an opportunity for a hearing, at least at the Board level, in relation to many planning by-laws.¹³⁰

For the rest, however, the legislature in Ontario does not seem to have accepted the need for any kind of hearing procedures in relation to proposed rules and policies. Indeed, as we have seen already, regulation-making is excluded specifically from the operation of the procedural requirements of the Statutory Powers Procedure Act.¹³¹

Generally, regulatory agencies in Ontario are either not given regulation-making authority,¹³² or where it is conferred, it is subject to confirmation by the Cabinet (Lieutenant Governor in Council).¹³³ For the most part, regulations are developed by the department of state responsible for the administrative agency and promulgated by the Lieutenant Governor in Council. No formal opportunity is provided for "notice and comment" by interested parties. The same is true of statutes giving authority to government departments

130 See Ontario Municipal Board Act, R.S.O. 1970, c. 323 (as amended). The Board is also subject to the Statutory Powers Procedure Act, S.O. 1971, c. 47, Part I, with respect to some of its functions. See also, Re Zadrevac and Town of Brampton (1973), 37 D.L.R. (3d) 326 (Ont. C.A.).

131 S.O. 1971, c. 47, section 3(2) (h).

132 See e.g. Upholstered and Stuffed Articles Act, R.S.O. 1970, c. 474, section 40; Securities Act, R.S.O. 1970, c. 426, section 147.

133 See e.g. Workmen's Compensation Act, R.S.O. 1970, c. 505, section 77(1); Ontario Water Resources Act, R.S.O. 1970, c. 332, section 62.

to carry out regulatory programs of various sorts. The regulation or rule-making authority generally vests in the Lieutenant Governor in Council or in the minister subject to Cabinet approval with no "notice and comment" procedure established.¹³⁴

Thus, for example, we find in the Ontario Environmental Protection Act of 1971¹³⁵ and the Environmental Assessment Act of 1975¹³⁶ extensive regulation-making powers conferred on the Lieutenant Governor in Council and no formal opportunity for interested party input established. The same is true of the recently enacted but as yet unproclaimed Ontario Securities Act,¹³⁷ in which no statutory recognition is given of the well-established practice of the Ontario Securities Commission of issuing policy statements, a practice that may in part be attributed to the absence of any formal rule-making authority in the Commission itself.

134 See e.g. Retail Sales Tax Act, R.S.O. 1970, c. 415, section 42; Department of Labour Act, R.S.O. 1970, c. 117, section 11(1) (Minister with Cabinet Approval) and (2) (Lieutenant Governor in Council).

135 S.O. 1971, c. 86, section 94.

136 S.O. 1975, c. 69, section 41.

137 S.O. 1978, c. 47, section 139. The OSC practice is discussed in greater detail, infra, at notes 189-203 and accompanying text.

2. Other Procedural Requirements

Despite certain terminological difficulties identified earlier, the definition of "regulation" in the Ontario Regulations Act captures most subordinate legislation-making, with the exception of municipal by-laws and a few other specific exceptions in the province of Ontario.¹³⁸ The purpose of the statute is primarily to ensure that legislation is publicized so that those affected or potentially affected by it may be aware of its existence. The procedures laid down are not really concerned with creating opportunities for commenting on the substance of the legislation in question, though as a matter of practice, publicity of the making of legislation, even if it is after-the-event, will on occasion generate critical comment about the merit of that legislation.

Given that most of this statute does not therefore deal with the problem of the need for public input into the making of subordinate legislation, the following brief description of the process by McRuer will suffice for present purposes:

Regulations coming within the Regulations Act are required to be published in the Ontario Gazette within one month of being filed, or after such extended time as the Minister charged with administering the Act orders. A regulation required to be published that has not been published is not effective against a person who has not had actual notice of it. Detailed provisions are made for the numbering of regulations and the method of publication.

139

138 See footnote 29, supra, for the full list.

139 Supra, note 1 at 364-65.

The only opportunity that this process offers for formal input as to substance is a requirement that a regulation be filed with the Registrar of Regulations before it comes into force.¹⁴⁰ According to McRuer, this official "is in a position to offer suggestions and make criticisms, which he could not do if departments were permitted to arrange publication directly".¹⁴¹ However, there is no suggestion that this opportunity for suggestions ever takes the form of close questioning of the substantive wisdom of the regulations being filed.

However, as a result of the McRuer Commission's recommendations, one reform to the Regulations Act did come about: the creation of a Standing Committee of the Ontario Legislative Assembly to which all regulations stood permanently referred.¹⁴² This, according to McRuer, was necessary so that the Legislature could have "an effective form of review" of subordinate legislation and that there could be protection for "the fundamental civil liberties of the individual".¹⁴³ Accordingly, in the 1968-69 session of the Legislative Assembly, such a Standing Committee was provided for in a new section 11 of the Act but, as recommended by McRuer with a view to making the Committee non-partisan in its operation, it was to be concerned only with "the

140 R.S.O. 1970, c. 410, section 2.

141 Supra, note 1 at 365.

142 Id., at 376-79.

143 Id., at 370.

scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations...".¹⁴⁴ As a result, any hope of effective legislative scrutiny of the substantive wisdom of particular regulations was lost immediately and no genuine formal, after-the-event substitute for an advance "notice and comment" procedure was created.

Whether McRuer was wise in so limiting his recommendations for the creation of a legislative scrutiny committee is a matter to which I will return later. However, I cannot forbear from wondering at this point about reasoning to the effect that the wisdom of regulations should not be a concern of the committee, as this was something "for which the government is responsible to the legislature",¹⁴⁵ and also assumptions that regulations should not be "initiating new policy, but should be

144 S.O. 1968-69, c. 110, section 1 (now R.S.O. 1970, c. 410, section 12). So far the Committee has reported to the Legislative Assembly on three occasions, twice in the last twelve months (see First and Second Reports of Standing Committee on Statutory Instruments, 2nd Session, 31st Legislature, June and December, 1978). Interestingly, the First Report of 1978 records the advocacy in the Committee's only previous report in 1973 of extending the jurisdiction of the Committee to include the "merits" of regulations and the endorsement of this recommendation in September 1975 by the Fourth Report to Government of the Ontario Commission on the Legislature ("the Camp Commission"). This was also concurred in June 1976 by the Second Interim Report of the Select Committee on the Fourth and Fifth Reports of the Ontario Commission on the Legislature. However, no legislative action has been taken. See the First Report of 1978 at 1 and 4-5.

145 Supra, note 1 at 377.

confined to detail".¹⁴⁶ Surely, committees of this kind are themselves devices of the legislature for ensuring government responsibility, and even in 1968 it must have been abundantly clear that regulations were doing far more than filling in details, whatever the traditional constitutional theory.

As far as by-laws are concerned, the Ontario Municipal Act lays down procedures that generally have to be followed for the effective authentication of by-laws.¹⁴⁷ However, the Act generally leaves the process for the passing of by-laws to the municipalities' discretion

146 Id., at 378. Of interest here are the comments of Professor K.J. Keith writing of the growing use of broad delegations of subordinate legislation-making power in New Zealand, a phenomenon with clear Canadian parallels:

We should be recognizing a new constitutional development. The principle reaffirmed by the 1962 Parliamentary Committee on Delegated Legislation [i.e. that Parliament is concerned with 'general and essential principles' and the executive, as the subordinate lawmaker, with the detail] may no longer be valid. At least it is often not accepted in practice. It may be that we should acknowledge the development of what is, in effect, a new prerogative power to control (or to attempt to control) the economy -- a power which must in large part come from Parliament, but which will be conferred in broad terms. In granting such recognition, we should also, however, be recognizing the exercise of the very extensive new powers -- one such means is the involvement of those affected in the process of exercising the power.

See K.J. Keith, "Constitutional Change" in Thirteen Facts (1977) 1 at 22.

147 R.S.O. 1970, c. 284, section 259.

148 Section 242, authorizing by-laws governing the conduct of council proceedings.

though where electoral approval of a by-law is required, detailed procedures are specified.¹⁴⁹ The significant difference, of course, between by-laws of a municipality and the regulations made by an administrative agency, departmental official, Minister of the Crown or Lieutenant Governor in Council, is that despite their theoretically subordinate nature, they are the equivalent of primary legislation at the municipal level. In other words, there is always a theoretical opportunity for debate of the substance of by-laws by the elected members of the municipal legislature.

Federally, the Statutory Instruments Act of 1971, which was enacted as a result of the MacGuigan Committee's recommendations,¹⁵⁰ provides the equivalent of the Ontario Regulations Act. It does, however, go somewhat further than the Ontario Act in the degree of scrutiny to which rules coming within its ambit are subject. By section 3, the Clerk of the Privy Council, in consultation with the Minister of Justice, is required to scrutinize a proposed regulation to ensure that

(a) it is authorized by the statute pursuant to which it is to be made;

(b) it does not constitute an unusual or unexpected use of the authority by which it is to be made;

149 Id., Part X, sections 261-81.

150 S.C. 1970-71-72, c. 38. See also the Regulations passed under the Act: SOR/71-592 as amended by SOR/72-94, SOR/72-527 and SOR/74-152.

(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the Canadian Bill of Rights; and

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

However, if the regulation offends in any of these respects, seemingly the most that can be done is to draw it to the attention of the regulation-making authority if the Minister of Justice agrees. It is also significant that, with the possible exception of (b) and the first part of (c), legality and language rather than the substantive merits of the regulation are to be the concern of those scrutineering.

Section 26 also provides for the establishment of a legislative committee to which all regulations would stand referred, and this was subsequently accomplished with the creation of the Standing Joint Committee on Regulations and other Statutory Instruments of the Senate and House of Commons.¹⁵¹ However, it is clear from the practice up

151 The Committee came into existence in 1973 in the First Session of the 29th Parliament. See Minutes of Proceedings and Evidence of Standing Joint Committee on Regulations and Other Statutory Instruments, First Session, 29th Parliament, Issue No. 1 at 3. The present criteria upon which the Committee operates are set out below. These were concurred in by the Senate on November 23, 1978 and the House of Commons on November 21, 1978. See Minutes of Proceedings and Evidence, Fourth Session, 30th Parliament, Issue No. 1 at 4-6:

Whether any Regulation or other Statutory Instruments within its terms of reference, in the judgment of the Committee:

1. (a) is not authorized by the terms of the enabling statute, or, if it is made pursuant to the prerogative, its terms are not in conformity with the common law; or
(cont'd)

until now that the Joint Committee, despite the opportunities for innovation provided by the lack of specificity of its role in the Act, has taken a limited view of its function. According to

151 (cont'd)

(b) does not clearly state therein the precise authority for the making of the Instrument;

2. has not complied with the provisions of the Statutory Instruments Act with respect to transmittal, recording, numbering or publication;

3. (a) has not complied with any tabling provision or other condition set forth in the enabling statute; or

(b) does not clearly state therein the time and manner of compliance with any such condition;

4. makes some unusual or unexpected use of the powers conferred by the enabling statute or by the prerogative;

5. trespasses unduly on the rights and liberties of the subject;

6. (a) tends directly or indirectly to exclude the jurisdiction of the Courts without explicit authorization therefor in the enabling statute; or

(b) makes the rights and liberties of the subject dependent on administrative discretion rather than on the judicial process;

7. purports to have retroactive effect where the enabling statute confers no express authority so to provide or, where such authority is so provided, the retroactive effect appears to be oppressive, harsh or unnecessary;

8. appears for any reason to infringe the rule of law or the rules of natural justice;

9. provides without good and sufficient reason that it shall come into force before registration by the Clerk of the Privy Council;

(cont'd)

Professor Janisch,¹⁵² and this is supported by the content of the Joint Committee's Second Report published in 1977,¹⁵³ "the work of the [Committee] has been largely technical in nature", following pretty much the same mandate as that given to the Clerk of the Privy Council and Minister of Justice in scrutinizing proposed regulations.

151 (cont'd)

10. in the absence of express authority to that effect in the enabling statute or prerogative, appears to amount to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment, and not merely to the formulation of subordinate provisions of a technical or administrative character properly the subject of delegated legislation;

11. without express provision to the effect having been made in the enabling statute or prerogative, imposes a fine, imprisonment or other penalty, or shifts the onus of proof of innocence to the person accused of an offence;

12. imposes a charge on the public revenues or contains provisions requiring payment to be made to the Crown or to any other authority in consideration of any licence or service to be rendered, or prescribes the amount of any such charge or payment, without express authority to that effect having been provided in the enabling statute or prerogative;

13. is not in conformity with the Canadian Bill of Rights;

14. is unclear in its meaning or otherwise defective in its drafting;

15. for any other reason requires elucidation as to its form or purport.

152 Supra, note 11 at 104.

153 Supra, note 151 at 9-27 demonstrates the Committee's application of the listed criteria to particular cases.

3. Summary

Barren as the common law might be in terms of imposing hearing procedures on rule-making authorities in Canada, it is no more than a reflection of the present statutory position. With very few exceptions, statutes in Canada do not make provision for any kind of hearing before rules are promulgated. In both Ontario and federally, there is a degree of legislative committee scrutiny after the rules come into effect, but both in theory and in practice this does not provide the assessment of the merits of proposed rules that, for example, is intended to be achieved by the U.S.

Administrative Procedure Act's "notice and comment" procedures.

Rather, it is technical in its focus, being concerned primarily with the legality and form of subordinate legislation. The same is true of the advance scrutiny of federal regulations and statutory instruments by the Clerk of the Privy Council and the Minister of Justice, despite the instruction of the empowering provision to be concerned with "unusual and unexpected use" of authority and undue trespasses "on existing rights and freedoms". As Professor Harry Arthurs noted in giving evidence before the MacGuigan Committee, "[t]o be effective, review at this level must above all, be informed; it must be contextual", and he doubted the ability of either a special but necessarily generalist "watchdog" committee or a generalist, busy and partisan Minister of Justice "to ensure that

regulations do not ... unduly infringe upon principles of fairness".¹⁵⁴

C. As Adopted by Administrative Agencies Themselves

In a recent book review, Professor Janisch notes how in some instances the administrative process itself is more willing to adopt fair procedures than the courts and the legislatures are to impose such procedures upon it.¹⁵⁵ The specific example that he quotes is that of the National Parole Board setting to work and devising certain procedures to be applied in parole revocation matters, despite the failure of the primary legislation or the courts when asked to impose any such procedures on the Board. He might also have very well used the example of rule-making, including policy formulation, for despite the reluctance of the legislatures and the courts either generally or specifically to impose rule-making or policy-making procedures on

154 See H.W. Arthurs, "Regulation-Making: the Creative Opportunities of the Inevitable" (1970), 8 Alta. L. Rev. 315 at 319. See also 319-21 generally. The note in the Alberta Law Review is based upon Professor Arthur's evidence before the Committee. The title to the note and pages 315-19 also reflect the author's views that there "ought to be the broadest possible mandate for regulation-making" Cf. note 146 and accompanying text. See also the clearly contrasting views of the Joint Committee, supra, note 151 at 27-28.

155 Hudson N. Janisch, Review of K.C. Davis, Administrative Law of the Seventies and B. Schwartz, Administrative Law (1978), 4 Dalhousie L.J. 824 at 841-43.

administrative agencies, many agencies, and in some cases government departments, have moved voluntarily into a regime of rule-making and policy-making hearings.

This voluntary adoption of hearings has been most marked in the major regulatory bodies at the federal level and perhaps no more so than with the CRTC. As noted previously, the present section 16(2) of the Broadcasting Act obliges the CRTC to follow a "notice and comment" procedure when broadcasting regulations are being proposed, and in the Telecommunications Bill presently before Parliament, this is carried over to the relatively recent telecommunications jurisdiction of the agency.

However, the agency has moved beyond the requirements of the Act quite dramatically with respect to the occasions on which it will hold hearings in the rule-making and policy-making areas. The Commission is a frequent issuer of policy statements and the practice is to hold public hearings on proposed policies to enable both the regulated industry and the public to make representations on them. Though not required by law, General Counsel to the CRTC, C.C. Johnston, feels such hearings are important because

[s]uch statements affect licensing decisions and may be the forerunners of regulations.

156

156 "Procedures Before the Canadian Radio-Television and Telecommunications Commission (CRTC)" (1977), 1 Advocates' Quarterly 25 at 29.

Prominent examples of such hearings in the past have included extensive public hearings on cable television¹⁵⁷ which led to, among other policies, the "commercial deletion policy", the subject of the litigation in the Capital Cities case discussed earlier. As well, there were extensive public hearings both in 1975 and 1977 on the controversial subject of pay television.¹⁵⁸

Aside from policy hearings of this kind, the CRTC has also been concerned to have public input into the development of procedures. Thus, after making preliminary suggestions for procedures in telecommunications hearings on July 20, 1976¹⁵⁹ and calling for comments, the Commission held a public hearing on the subject in Ottawa from October 25 to 28, 1976.¹⁶⁰ Eventually, in May 1978, draft procedures were produced and an opportunity for further comment was made available.¹⁶¹ Similarly, in relation to the broadcasting

157 See Daniel Baum, "Broadcasting Regulation in Canada: The Power of Decision" (1975), 13 O.H.L.J. 693 at 708-12 and 720-21 for a very critical account of this process.

158 For an account of the pay television saga, see Geoffrey Stevens, "The monster lives", Globe and Mail, 16 March, 1978.

159 See announcement of availability of policy and holding of public hearings, Canada Gazette, Part I, Vol. 110, July 31, 1976 at 3804.

160 See Telecom. Decision CRTC 78-4, May 23, 1978 for an account of the process by which the rules were developed. This decision was published separately by the CRTC in a document entitled CRTC Procedures and Practices in Telecommunications Regulation. The draft rules were also published separately.

161 Id., at 53, inviting written comments up to September 15, 1978.

side of its jurisdiction, the CRIC issued draft procedural rules in July 1978,¹⁶² called for comments¹⁶³ and held a public hearing in Ottawa in November.¹⁶⁴

Interestingly enough, the May 1978 telecommunications procedures also speak to another development on the part of the CRIC in its telecommunications jurisdiction: the holding of "issue hearings".¹⁶⁵ The Commission is of the view that many of the issues currently dealt with on rate applications need to be separated out and considered independently as a matter of policy divorced from the particular matter before it. This, it is felt, can be achieved by preparing preliminary documents, raising questions and putting the matter before a public hearing, much in the manner of policy hearings on the broadcasting side of its jurisdiction. In fact, at the time the draft procedures were issued in May 1978, the first stage of such an "issue hearing" had already been held. This was Phase I of the so-called Cost Inquiry: the CRIC's Inquiry into Telecommunications Carriers' Costing and Accounting Procedures.¹⁶⁶

162 See Canada Gazette, Part I, Vol. 112, 5 August 1978 at 4659.

163 Id., at 4660.

164 Id., announcing the commencement of a public hearing on November 21, 1978.

165 Supra, note 160 at 41. See also Johnston, supra, note 156 at 43-44.

166 See announcement of inquiry in Canada Gazette, Part I, Vol. 111 at 5634.

It is apparent that the CRTC is not only following its statutory mandate to allow formal opportunity for input with respect to proposed regulations, but it also follows such practices in relation both to policy formulation and the development of procedural rules. Writing recently, Professor Janisch has drawn quite a contrast between the CTC and the CRTC in this regard:

[T]he CTC, despite its broad policy-making mandate, has largely failed to articulate the general policy considerations which underlie its individual decisions. By and large, it has chosen to confine itself to adjudicating cases as they come before it, and it has not sought to set out the general principles it applies in any coherent and open manner. 167

Yet even with this agency there has been some movement. Janisch, in his Law Reform Commission of Canada study, The Regulatory Process of the Canadian Transport Commission, written in 1975, spoke of the "salutary trend" of the CTC "holding a number of broader hearings" and he instanced the 1975 hearings by the Air Transport Committee into the adequacy of maritime air service, and the public hearings of the Telecommunications Committee (the jurisdiction of which has now been taken over by the CRTC) on its proposal for a "rate adjustment formula procedure" and the procedural issue of whether intervenors in rate hearings should receive costs.¹⁶⁸ Since that was written we have witnessed the holding of public hearings by the Railway Transport

167 Supra, note 11 at 95-96. See also his earlier article, "The Role of the Independent Regulatory Agency in Canada" (1978), 27 U.N.B.L.J. 87 at 96-100.

168 (Ottawa: Minister of Supply and Services Canada, 1978) at 84.

Committee on transcontinental passenger train services in 1976¹⁶⁹ and in 1977, the Air Transport Committee's hearings on cut-rate air charter systems within Canada.¹⁷⁰ The November 4, 1978 issue of Part I of the Canada Gazette also contains notice of intention to amend the Air Carrier Regulations and comments are called for.¹⁷¹

While it may still be true to say that the CTC is not generally committed to acting by policy statements and rule-making but prefers to leave matters to adjudication, these examples do at least demonstrate a perhaps inevitable movement into dealing with some issues at a broader policy level involving participation by both those particularly interested and members of the public generally.

What is true of the CTC can also be said of the National Energy Board. Alastair Lucas and Trevor Bell, in their 1976 LRC study of that agency, speak of the emergence of rule-making hearings since 1970 reflecting a significant change from the Board's prior willingness to allow policy and criteria to be "developed on a case-by-case basis".¹⁷²

169 Hearings were held in Ottawa, Toronto and Sudbury and followed a major policy statement on rail passenger services issued on January 29, 1976 by the Minister of Transport.

170 See announcement of hearings in Ottawa on September 12, 1977 in Canada Gazette, Part I, Vol. 111, 1977 at 3946. See also Globe and Mail, September 12, 1977, "Charter flight backers take aim at Air Canada as public hearings open".

171 Canada Gazette, Part I, Vol. 112, November 4, 1978 at 6641.

172 The National Energy Board: Policy, Procedure and Practice (Ottawa: Minister of Supply and Services Canada, 1977) at 25.

The significant breakthrough came with the 1973-74 hearings on oil exportation and the use of this form of public inquiry has continued up to the present continuing examination of the domestic gas supply-and-demand situation.¹⁷³

Not all federal agencies have moved in this direction, however, if the other Law Reform Commission studies are to be believed. With the National Parole Board, even access to Parole Board rules and policies still remains a problem, not to say anything about the possibility of public hearings or more limited "notice and comment" procedures in the development of such rules and policies.¹⁷⁴ Secrecy also appears to be a major problem with the Atomic Energy Control Board. In his 1976 LRC paper, Professor G. Bruce Doern describes the review of its regulations that the Board conducted between 1970 and 1974. It reflected

... an ingrained occupational habit of the AECCB. Its consultative and regulation-making processes tend to be confined to a closed network of experts and representatives of federal, provincial and local governments. 175

173 Id., at 25-29. See also announcement of domestic gas supply and demand hearing in Calgary commencing on October 11, 1978 in Canada Gazette, Part I, Vol. 112 at 2852.

174 Pierre Carrière and Sam Silverstone, The Parole Process: A Study of the National Parole Board (Ottawa: Minister of Supply and Services Canada, 1976) at 145-46.

175 The Atomic Energy Control Board (Ottawa: Ministry of Supply and Services Canada, 1976) at 42. See also 8 and 42-3. Note the opportunity for notice and comment contemplated in the new Nuclear Control and Administrative Bill, supra, note 122.

As well as this activity at the agency level, there has also been some movement at the federal government department level. For example, the 1978 volume of Part I of the Canada Gazette contains a number of examples of notice being given by the Department of Transport of proposed changes in technical standards and the promulgation of new standards under the Radio Act and calling for comments.¹⁷⁶ Also of interest is the June 18, 1977 notice¹⁷⁷ in the Canada Gazette from the Department of the Environment informing of its intention to develop standards under the Clean Air Act for the emission of vinyl chloride, followed in August, 1978 by a detailed statement of the thrust of the submissions received and the effect they had on the Department's thinking plus draft regulations as required by section 7(2) of the Act.¹⁷⁸

Of importance also is the socio-economic impact analysis program for major proposed health, safety and "fairness" (protection against fraud and deceptive practices) regulation. This program, announced by the President of the Treasury Board and the Minister of Consumer and Corporate Affairs on December 14, 1977 and in effect as from August 1, 1978, calls, inter alia, for all new major regulations in those three areas promulgated under any federal statute to be subject to a

176 See e.g. Canada Gazette, Part I, Vol. 112, September 9, 1978 at 5500; October 14, 1978 at 6216; November 18, 1978 at 6888.

177 Canada Gazette, Part I, Vol. 111, June 18, 1977 at 3251.

178 Canada Gazette, Part I, Vol. 112, August 26, 1978 at 5193 and 5198.

"notice and comment" procedure.¹⁷⁹ To quote from the Economic Council of Canada's November 1978 Regulation Reference: a Preliminary Report to First Ministers:

The terms of, the legal authority for, the purpose of a major new HSF regulation will be pre-published in Part I of The Canada Gazette along with a summary of the SEIA (The Department of Justice will make sure, before advanced publication (which will occur at least 60 days before the promulgation of the proposed regulation) that the format of the summary of the SEIA is respected by the sponsoring departments). In addition, the complete SEIA will be made publicly available. Between notification and promulgation, representations made by the interested parties to the sponsoring departments will also be made publicly available. 180

At the provincial level, there are also instances of the voluntary acceptance of rule-making or policy formulation procedures by administrative agencies or government departments. For example, as early as 1966 the Nova Scotia Board of Commissioners of Public Utilities held public hearings¹⁸¹ with respect to the adequacy of its regulations and rules made under the Gasoline Licensing Act¹⁸² with respect to the opening and closing hours of retail gasoline outlets in the province. Nevertheless, it is fair to say that in the province of Ontario there has by no means been the volume of voluntary recognition of such procedures by major administrative agencies as there has been at the federal level. The explanation for this may in

179 See Consumer and Corporate Affairs Canada News Release, NR-77-82.

180 Document 800-9/004 at 76-7.

181 See H.N. Janisch, 1 Administrative Law Materials (Halifax: Dalhousie University Faculty of Law, 1975) at 53.

182 Then R.S.N.S. 1954, c. 108 (as amended).

fact be fairly simple, however. According to Larry Fox, in his study for the Commission, Freedom of Information and the Administrative Process, administrative boards and tribunals in Ontario are generally quite unlike American administrative agencies and the federal boards discussed above.

... [M]any Ontario administrative boards and tribunals have been established for the single purpose of conducting hearings. The other aspects of regulation -- investigations, policy-making, research -- are assigned to the appropriate ministry of the government.

183

He later continues:

In Ontario, setting standards, criteria and rules has generally been reserved to the enactment of statutes by the legislature and the promulgation of regulations under the formal authority of the Lieutenant Governor in Council.

184

As a result of the formal location of the rule-making and policy-making functions in bodies other than the agency, it is far easier for many administrative agencies to hide behind the fiction that they are only applying law and not making policy and thereby avoid any suggestion that they should be issuing policy statements for "notice and comment" by those concerned. Yet, as Fox points out,

... [i]n interpreting their respective legislative mandates in the context of individual decisions, policy is thus constantly being developed.

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183 Fox, Larry M., Freedom of Information and the Administrative Process. This paper will shortly be published by the Commission as Research Publication 10. The quotation is taken from Chapter III, section A.

184 Id.

185 Id.

Unfortunately, this does not seem to have led many Ontario boards to a realization that their legislative mandate might at times be better fulfilled if, rather than waiting for individual cases to arise, they tried their hand at developing policy guidelines in advance, giving individuals an opportunity to comment.^{185a}

Of course, as the existence of a Claims Adjudication Manual indicates, the Workmen's Compensation Board is involved in such a process to a certain extent. As Professor Ison points out in his study of that Board for the Commission, this kind of manual is inevitable given the large number of claims and large number of officers dealing with them.¹⁸⁶ However, the contents of the Manual are not even available, let alone subject to "notice and comment" procedures before promulgation. It is also interesting that, despite the fact that the Workmen's Compensation Board has authority to make its own regulations with the approval of the Lieutenant Governor in Council,¹⁸⁷ it seldom develops law in this formal way but instead relies upon the informal manual and case-by-case adjudication.¹⁸⁸

185a Since this paper was written, my attention has been drawn to the Ontario Highway Transport Board's news release of January 19, 1979 announcing hearings on PCV "R" dump-truck licensing procedures and regulations to be held in March and April 1979. This marks some indication that that Board may in future follow the lead of the Ontario Securities Commission discussed infra.

186 Terence G. Ison, Information Access and the Workmen's Compensation Board (Research Publication 4, Commission on Freedom of Information and Individual Privacy, 1979) at 48.

187 Workmen's Compensation Act, R.S.O. 1970, c. 505, section 77(1).

188 Supra, note 186 at 49.

Reliance on adjudication and non-articulated standards has also until recently been the trademark of the Ontario Securities Commission. According to Jeff Cowan, writing about the discretionary powers of the Director of the OSC in the Osgoode Hall Law Journal in 1975:

The practice to date of the OSC has been one which has followed the adjudicatory approach in the implementation of legislative policy as perceived by the Commission. An examination of the reported decisions has generally revealed a lack of specific policy guidelines indicating the considerations the Director seems relevant to the use of his statutory authority. 189

He then goes on to note that the regulations, which are made by Cabinet

... have merely been used to flesh out the administrative and procedural structure of the regulatory process without reference to substantive standards that could guide the exercise of discretion. 190

A perusal of the Business Section of the Globe and Mail over the last couple of years¹⁹¹ as well as the Ontario Securities Commission

189 Supra, note 11 at 771.

190 Id., at 772.

191 See also Mark Q. Connelly, Securities Regulation and Freedom of Information (Research Publication 8, Commission on Freedom of Information and Individual Privacy, 1979) at 73:

The OSC is remarkable for the degree of openness with which it conducts proceedings in the nature of rule-making in the absence of any statutory or common law compulsion of openness.

As well as recent experiences with the increased use of policy hearings by the Ontario Securities Commission, the current round of hearings by the Ontario Energy Board on the issue of how
(cont'd)

Bulletin and Weekly Summaries for that period seems to reveal a changing pattern, with a movement towards "notice and comment" procedures in relation to both policy statements and regulations proposed to Cabinet for promulgation. Undoubtedly, some important policies are still developed in individual adjudications.¹⁹² However, in 1977 and 1978 alone, the OSC, for example, provided "notice and comment" opportunities through advertisement in the Bulletin and/or the Weekly Summary on: advance review of takeover bid circulars;¹⁹³ aspects of a new "going private" policy;¹⁹⁴ a draft regulation on segmented reporting;¹⁹⁵ the desirability of discontinuing publication of certain information;¹⁹⁶ a position paper on changes in the

191 (cont'd) customers should be charged for energy also suggests quite a movement on the part of some of the major regulatory bodies in Ontario toward the practice of federal agencies such as the CRTC. See Hugh Winsor, "Hearings vital to consumer", Globe and Mail, 25 January, 1979; Ian Hamilton, "City activist attacks Hydro's rate structure", Kingston Whig-Standard, 27 January, 1979.

192 See e.g. In re Cablecasting Ltd., OSC Bulletin, February 1978, 37 at 41, where the OSC lays down principles or policy in relation to the use of a particular section of the Securities Act.

193 OSC Bulletin, March 1978 at 61.

194 OSC Bulletin, August 1978 at 214. This records that a public meeting was held and unsolicited written comments were received. Urgency dictated that some policy changes be made immediately but other proposals "should be subjected to rigorous debate and analysis".

195 OSC Weekly Summary, 14 July, 1977. As a result of comments received, the OSC abandoned this proposal. See OSC Bulletin, January 1978 at 2.

196 OSC Weekly Summary, August 25, 1978.

regulations and policies relating to the activities of non-resident, non-registered brokerage houses in Ontario;¹⁹⁷ proposed amendments to the Toronto Stock Exchange by-laws;¹⁹⁸ and the development of a policy in relation to the distribution of shares issued by junior mining exploration and junior oil and gas companies.¹⁹⁹

The following of this practice was not universal during the year and the practice of allowing confidential submissions would seem to have little to commend it.²⁰⁰ Nevertheless, it does provide an important instance of voluntary adoption of "notice and comment" procedures, rendered more significant by the stated intention of the OSC to publish and allow comments on the proposed regulations under the new Securities and Commodity Futures Acts of 1978 and related amendments to the Business Corporations Act, all of which are due to come into

197 OSC Bulletin, February 1978 at 17. Interestingly, the OSC had already discussed the matter with the Toronto Stock Exchange, the Investment Dealers' Association of Canada and a number of non-resident firms before calling for public comment (see 18). In the Weekly Summary of October 13, 1978 further comments were solicited on this matter.

198 OSC Bulletin, March 1978 at 62.

199 OSC Bulletin, February 1978 at 21. Once again, there had already been a meeting with members of the broker-dealer industry.

200 For a discussion of this issue, see Connelly, *supra*, note 191 at 74-77. However, he notes the OSC's statement discouraging requests for confidentiality which appeared in the Weekly Summary of August 31, 1978 at 6A.

effect this year.²⁰¹ Indeed, this process has already started with the holding of a public hearing on the draft Commodity Futures Regulations in December.²⁰² However, there has also been the controversial announcement by Consumer and Commercial Relations Minister, Mr. Frank Drea on December 15, 1978 that a proposed salary disclosure provision for the directors and senior officers of public companies under the new Securities Act had been dropped from the draft regulations after discussion with "affected persons in the business community and with other government agencies".²⁰³ Whether this will undermine the integrity of any subsequent "notice and comment" procedures on those regulations remains to be seen.

Fox, in the course of his study, also examines in some detail one of the Ontario agencies which has been given formal responsibility for broad-ranging policy-making, the Ontario Milk Marketing Board.²⁰⁴ This examination reveals that while there is extensive consultation on

201 Securities Act, S.O. 1978, c. 47; Commodity Futures Act, S.O. 1978, c. 48; Business Corporations Amendment Act, S.O. 1978, c. 49. See OSC Bulletin, March 1978 at 56-7; July 1978 at 172 promising the opportunity for "notice and comment" on the new regulations, and the Globe and Mail, 19 December 1978, "New OSC Acts likely by spring", to the effect that the new regulations were now available for comment.

202 See Globe and Mail, 5 December 1978, "OSC may alter some proposed regulations for commodity trade".

203 See Globe and Mail, 5 December 1978, "Executive salary disclosure plan dropped in revised OSC draft".

204 Supra, note 183 at 184 ff.

policy development between the agency and the various interests in the milk industry, it does not extend as far as a formal or systematic attempt to secure public input into the regulatory process, though there is evidently some informal contact with the public through consumer groups, such as the Consumers' Association of Canada, over price changes.

In the limited material available to me, it also seems as if this kind of consultation generally marks the limit of the opportunity for comment on proposed regulations and policies developed by government departments, as opposed to administrative tribunals and agencies. Nevertheless, the Ministry of Labour does provide at least one current example of voluntary adoption of a "notice and comment" procedure in relation to proposed regulations.

The Standards and Programs Branch of the Ministry is responsible, among other things, for developing occupational health and safety hazard standards under three Ontario statutes, The Industrial Safety Act,²⁰⁵ The Construction Safety Act²⁰⁶ and Part 9 of the Mining Act.²⁰⁷

205 S.O. 1971, c. 43 (as amended).

206 S.O. 1973, c. 47.

207 R.S.O. 1970, c. 274.

To quote from a paper prepared for the Commission by Hugh R. Hanson:

Draft standards are devised by the branch in consultation with outside experts and other ministry officials. Briefs are requested to be submitted sixty days after publication of a draft standard in the Ontario Gazette. When the briefs are received, they are analyzed and discussed both within the ministry and with outside experts. From this analysis a revised set of standards is developed.

When the revised standard has been completed it is again published in the Ontario Gazette for comment. After a further sixty-day period, any further briefs are analyzed and discussed. If necessary, the standard will be revised again. 208

Examples of this procedure can be found in the Ontario Gazette for July 22, 1978, whereby the Ministry of Labour gave notice of draft standards in relation to lead, asbestos, silica and occupational health hazards,²⁰⁹ and for August 19, 1978 in which notice was given of intent to regulate iso-cyanates, mercury, noise, vinyl chloride monomer and occupational health hazards.²¹⁰ This, of course, bears

208 Hugh R. Hanson et al., Access to Information: Ontario Government Administration Operations (Research Publication 6, Commission on Freedom of Information and Individual Privacy, 1979) at 69.

209 Ontario Gazette, Vol. 111-29, July 22, 1978 at 3546.

210 Ontario Gazette, Vol. 111-33, August 19, 1978 at 3936. See also what seems to be the first Ontario "notice and comment" requirement in the proposed Occupational Health and Occupational Safety of Workers Act, Bill 70, 2nd Session, 71st Legislature, an omnibus Act repealing inter alia the Construction Safety, Industrial Safety and most of Part IX of the Mining Acts and regularizing the present practice. Before a substance can be prescribed by the Lieutenant Governor in Council as "designated" under section 41(14), section 22(1) requires the Minister to publish a notice in the Ontario Gazette stating this intention "and calling for briefs or submissions". Then, by section 22(2) sixty days notice of the regulation has to be given in the Gazette before filing with the Registrar of Regulations. Also, since this paper was written
(cont'd)

some resemblance to the "notice and comment" procedure prescribed by the United States Administrative Procedure Act and also corresponds to the type of procedure presently required of the federal Ministry of the Environment under section 7(2) of the Clean Air Act.

Basically what appears to be happening federally and to a lesser extent at the provincial level in Ontario is a gradual gathering of momentum in the acceptance, by legislators in some instances and by a number of rule- and policy-makers, that there are advantages to be gained from opening up their processes to various forms of formal public participation.²¹¹ In some cases, of course, this may simply be a response to sustained political or public pressure demanding greater opportunity for input, but it is probably also fair to say that there has been some recognition that proceeding by policy-making or rule-making hearings has its advantages, be it over proceeding on a case-by-case adjudicative basis or over policy-making or rule-making without any consultation with outside groups or with only limited consultation.

210 (cont'd) initially the Minister of Consumer and Commercial Relations has given a ninety-day "notice and comment" period in relation to an extensive fire-fighting, safety and prevention code. See Ontario Gazette, Vol. 112-2, January 13, 1979 at 385.

211 It also deserves to be noted that there has also been a long history in Canada of the use of Commissions of Inquiry, with their attendant public hearings, to investigate major policy issues. See Watson Sellar, "A Century of Commissions of Inquiry" (1947), 25 Can. B. Rev. 1 and Law Reform Commission of Canada, Working Paper 17, Commissions of Inquiry: A New Act (Ottawa: Supply and Services Canada, 1977).

D. Conclusion

This survey of the present law has revealed a very haphazard picture as far as rule-making procedures are concerned. At three levels, common law, statute law and voluntarily-accepted procedures, there are in total a fair number of indications of the acceptance in some contexts of rule-making procedures. If anywhere, the existence of such procedures seems to be greatest in recent federal legislation and draft legislation and in the functioning of the major federal regulatory agencies, though even here it is by no means consistent. The major question that the remainder of this paper will focus upon is whether or not the law should be left where it is presently; namely, in a state of gradual evolution through common law, statute law and voluntary acceptance; or whether there needs to be consideration given to more direct and immediate statutory action, either generally or in relation to certain types of rule-making and policy-making.

CHAPTER IV

PRIOR REJECTION OF HEARING PROCEDURE FOR REGULATIONS

A. The McRuer Commission

As already detailed in the Introduction, the McRuer Commission, reporting in 1968, rejected summarily proposals for the introduction in Ontario of hearing procedures in relation to the promulgation of statutory rules. The extract quoted in the introduction cites "unnecessary delay" and duplication of existing informal consultation practices as being the justification for the position taken and, in the 2-1/2 pages of the McRuer Report devoted to this issue, little more is in fact said.²¹²

The Report starts off by asserting that though there is no legal requirement for consultation with persons affected, such consultations are in fact a feature of the Ontario practice before regulations are promulgated. Only matters where the confidentiality of important government policy is at stake are not discussed in advance. No data

212 Supra, note 1 at 362-64.

or examples are in fact provided, but presumably the McRuer Commission either made inquiries or had sufficient personal knowledge to be able to make their assertions confidently.²¹³

The Report then goes on to report the failure of the "notice and comment" procedure contained in the United Kingdom Rules Publication Act of 1893,²¹⁴ which led to its repeal in 1946.²¹⁵ According to Professor H.W.R. Wade, whom the Commission consulted on this issue, not only did the provisions never work as intended but informal consultation had almost become a constitutional convention so that the statutory requirement was redundant.²¹⁶ Professor Wade also reported on the absence of any demand in the United Kingdom for a change back to the previous practice.²¹⁷

After a very brief account of the provisions of the American Administrative Procedure Act but no attempt at an evaluation of its

213 Id., at 362-63.

214 Id., at 363.

215 By the Statutory Instruments Act of that year. The McRuer Commission also noted the abandonment of a similar experiment in Australia during the First World War.

216 See H.W.R. Wade, Administrative Law, *supra*, note 34, at 128-29; B. Schwartz and H.W.R. Wade, Legal Control of Government: Administrative Law in Britain and the United States (Oxford: Clarendon Press, 1972) at 97-98.

217 Supra, note 1 at 363.

effectiveness,²¹⁸ the Commission made the statement quoted in the Introduction and then ended up by recommending that, if prior consultation was desired in particular cases,

... provision should be made for an advisory board representative of the interests of the persons or classes who may be affected, with which the Minister recommending, approving or making the regulations is required to consult before so doing.

219

In speaking of "regulations" it is clear that the Commission had in mind all cases of rules made in the exercise of sub-delegated legislative power, with the possible exception of municipal by-laws. However, no mention at all is made of the issue as to whether hearings might be required or desirable in relation to policy-making or the promulgation of interpretative bulletins. Indeed, a feature of the whole Report is its almost complete failure to recognize the existence of discretion and the policy formulation role of administrative agencies and government departments.²²⁰

In part, this lack of recognition stems from an unwillingness to pay more than passing acknowledgement to the reality of modern government -- that discretion exists everywhere, that primary legislation cannot achieve everything, nor is it desirable that it attempt to do so. In

218 Id.

219 Id., at 364.

220 For example, in its consideration of the scope of judicial review, the Report does not deal with review for abuse of discretion as a separate ground of judicial review.

almost a reiteration of Lord Hewart, the Report commences its section on delegated legislation with the following statement:

In an ideal legal system, all rights and liabilities of the individual in relation to others and to government would be established by stated rules of law applied by the ordinary courts of law. New rules would be made by the legislature, which is representative of and responsible to the people, with constitutional and political safeguards for the exercise of its power. There would be no arbitrary or discretionary powers vested in bodies or persons other than the legislature, or those directly responsible to it. 221

Why this would be an "ideal legal system" is not made clear and the Report in a brief paragraph goes on to admit that perhaps it is not really possible today. However, that the Commission is still firmly wedded to the idea as a matter of principle is confirmed when later it set up the tasks that it thought should be performed by the recommended legislative committee for the scrutiny of regulations. The committee should ensure that regulations do

... not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute. 222

In many respects, this attitude towards the place of regulations and discretionary power generally in government may go a long way towards explaining the views of the Commission on proposals for rule-making hearings, and its complete failure to deal with hearings on proposed policy statements. In a legal system where most things are accomplished by primary legislation, where rule-making is confined to

221 Id., at 335. Cf. notes 146, 154.

222 Id., at 378.

filling-in matters of detail, and where discretion is kept to an absolute minimum, the need for hearings in relation to rules and policies is not all that significant. Important matters are not at stake.

Undoubtedly, the Commission did not take such a simplistic view in its own mind but the language of the Report does suggest a certain philosophy about government which has an obvious impact on the way certain problems will be viewed. For example, it may explain why the Commission was much more concerned with the opinions of Professor Wade about the United Kingdom experience than it was about the effectiveness of the United States Administrative Procedure Act. That statute is an integral part of a system where major policy issues are dealt with by so-called independent regulatory agencies. Given that Ontario, at that time and even now ten years later, has not followed that route to anywhere near the same extent as, for example, the federal government, it is perhaps easy to see how the provisions of the Administrative Procedure Act could be readily dismissed. In fact, some of the Commission's views on other issues make it clear that it was anxious to avoid any step in the direction of the American situation of independent regulatory agencies. Thus, it recommended:

If effective administration requires that legislative powers be conferred directly on a person or body other than the Lieutenant Governor in Council or a minister, political control can be and should be maintained

by making the exercise of power subject to the approval or disallowance of the Lieutenant Governor in Council or a minister.

223

However, even accepting that it may be desirable to prevent Ontario moving in the direction of government by independent regulatory agency, one thing is clear: the concept of ministerial responsibility, in which McRuer places so much trust, is completely inadequate in these days of incredibly complex government as the major, between election, locus of political accountability. What are needed are supplementary forms of responsibility for government action and a recognition that democracy must be established in those highly significant areas outside of the legislature where laws and policies are fashioned. Most administrative agencies and all government departments in Ontario make both law and policy. Given that reality, the procedures established by the American statute suggest a significant method by which the process of modern government in Ontario can be democratized.

Reverting to the position in the United Kingdom for a moment, it should be pointed out that, as opposed to the position in Ontario, many

223 Id., at 360. It is, in fact, interesting to note some movement towards greater congressional control of the agencies in the United States. See Janisch, supra, note 11 at 57 and 61 and supra, note 167 at 104-09. This movement has not, however, given rise to any demand for abolition of rule-making procedures. Indeed, as will be seen, infra, the pressures are more for expansion of such procedures, though admittedly, much of this pressure results from a sense that the courts need to be effective review agents in the absence of systematic congressional control, and for this purpose they need to be presented with an adequate rule-making record. It is, however, questionable whether clearer, theoretical parliamentary responsibility for agencies and departments in Canada really translates into any kind of effective, systematic scrutiny.

statutes in fact contain provisions for "notice and comment" and other forms of consultation that have to be followed before regulations are made.²²⁴ Professors Griffith and Street in Principles of Administrative Law list four categories of procedure; two ordinary, two extraordinary: (i) opportunity for individual objection, including the possibility of a public inquiry; (ii) consultation with specified interests (the ordinary); (iii) preparation by affected interests; (iv) approval by a statutory body (the extraordinary).²²⁵ Thus the repeal of the general notice and comment procedure of the Rules Publication Act of 1893 did not mean the disappearance of all forms of statutorily-mandated consultative procedure in the United Kingdom.

It is also interesting to note, as a counterweight to Professor Wade's views, the following statement by Griffith and Street which comes at the conclusion of the discussion of present procedures:

Government departments seem to be extremely reluctant to explain in detail the reasons which have led them to make their proposals and are often reluctant to impart the details of their proposals. 226

This demonstrates at least some dissatisfaction with the effectiveness of the present system of formal and informal consultation. Similarly,

224 See J.A.G. Griffith and H. Street, Principles of Administrative Law (London: Pitman, 4th ed., 1966) at 128-141.

225 Id.

226 Id., at 140.

the late Professor S. A. de Smith in the third edition of Judicial Review of Administrative Action recommends:

Some regard might well be paid to American experience in the shaping of hearing procedures prior to the issue of subordinate legislation.

227

Finally, it remains to be remarked that Professor Wade himself in his fourth edition takes a somewhat different view of the need for hearings when it is a question of the development of policies to govern future cases. He advocates hearings in such cases, at least where "loss of livelihood" and "loss of property" may be involved.²²⁸ He also talks about the policy-maker being assisted in reaching a better decision "if he hears the objections to his policy from those who have the strongest interest in contesting it".²²⁹ There is, in fact, a strange ambivalence here which as one commentator has noted²³⁰ is also to be found in the different results in Bates v. Lord Hailsham and the Liverpool Taxi case. In Bates, it will be recollected, no hearing was required because the function was legislative while, at least according to Lord Denning M.R., the formulation of a policy had to be preceded by a hearing in Liverpool Taxi. The ambivalence, of course, is in seeing no need for a hearing in relation to the creation of a binding

227 Supra, note 34 at 168.

228 Supra, note 34 at 470.

229 Id., at 471.

230 See J.M. Evans, supra, note 85.

legislative rule only changeable by future legislation, yet seeing the need for one in the development of a policy which is always open to reconsideration in future individual cases and which is not binding on the decision-maker.

The McRuer Commission Report does, of course, assert two specific reasons for rejecting the proposals for hearings prior to the promulgation of subordinate legislation. The assertion that adoption of something equivalent to the APA "notice and comment" procedures would cause undue delay is difficult to deal with. Certainly, it is easy to see how certain rules and policies may be promulgated later if hearings of any sort are required, but whether that is a bad thing presumably depends upon whether the hearings contribute to more effective rules and policies. Also, it has to be noted that, even under the APA, considerations such as urgency can lead to dispensation with the procedures laid down.²³¹

Perhaps of more substance is the assertion that the adoption of hearing procedures would lead to unnecessary duplication of the informal consultation that invariably occurs. Hopefully, that would not be the case in that the informal consultation would come to be replaced rather than be duplicated by the statutorily-required hearing. However, that probably does not meet the real point which I assume

231 Section 553(b) (B).

is that informal consultation is so extensive as to render mandatory formal requirements unnecessary, particularly when those formal requirements may lack the flexibility and openness of informal contacts and thereby lead to less informed rule-making.

This point is made more directly by Professor Wade, who continues to be opposed to rule-making hearings, in the fourth edition of his Administrative Law text published in late 1977:

In Britain the practice counts for more than the law. Consultation with interests and organizations likely to be affected by rules and regulations is one of the firmest and most carefully observed conventions... It may be that consultation which is not subject to statutory procedure is more effective than formal hearing, which may produce legalism and artificiality... But it is for the department to decide whom it will consult and more attention is likely to be given to official and representative bodies than to individuals... Consultation before rule-making, even when not required by law, is in fact one of the major industries of government. It is doubtful whether anything would be gained by imposing general legal obligations and formal procedures.

232

He then concludes by repeating what he told the McRuer Commission back in 1969; that there was no demand in the United Kingdom for such reforms anyway.²³³

One thing that appears to be forgotten in such comments, however, is the fact that, at least as provided for in the Administrative

232 Supra, note 34 at 729-30.

233 Id., at 730.

Procedure Act, rule-making does not demand anywhere near the same kind of process as is required for adjudication. The "notice and comment" procedure is basically just that: an opportunity to comment, generally only in writing, on proposed rules.²³⁴ Presumably this has some tendency to eliminate legalism which so easily can creep into more formalized adjudicative-type hearings. The artificiality may come, of course, in the sense that particularly those regulated will tend to be less frank with the government department or administrative agency if forced to put their views in a document which will be available freely to the public. This, of course, is always one of the potential costs of open government at any level and there is little doubt that it may occur, particularly if the department or agency concerned is still prepared to consult off-the-record with those regulated despite the imposition of rule-making procedures. However, if such consultations were prohibited, it may well be that in the long run, those reluctant to put their real views in a public document would come to realise that their interests would only be reflected in rules if they were prepared to do so. It is also worth noting once again that the APA provides for exceptions to be made to the basic procedures in exceptional cases, so that the confidentiality of certain material, such as might lead, for example, to loss of a competitive position if revealed, can be protected from disclosure.²³⁵

234 Section 553(c). The opportunity for comment may in the discretion of the agency be "with or without opportunity for oral presentation".

235 Section 553(b) (B).

As mentioned earlier, the McRuer Commission neither provides data nor gives examples as to the kind of consultation that was in fact taking place in the late sixties, though the subsequent MacGuigan Committee Report at the federal level indicated that government departments and agencies were questioned about their consultative practices.²³⁶

McRuer's lack of data and examples has caused critical comment from some observers. Henry Molot says:

Unfortunately, no evidence of the extent or efficacy of this procedure [i.e. "extensive consultation"] is presented. 237

Perhaps, more pertinently, Professor Janisch expresses concern as to whom this extensive consultation involves:

My concern is, of course, that less organized and influential interests such as consumer, safety and environmental will not be consulted unless a formal forum for participation is created. 238

236 Supra, note 2 at 43. Departments and agencies were asked:

11. Does your department or agency consult interested or affected persons when preparing regulations so as to obtain their views with respect to the scope and content of the regulations? If so, please advise as to the procedures used, formal or otherwise, for obtaining or implementing this consultation.

According to the Report, the answers showed

... that almost invariably departments and agencies consult interested and affected persons and representative parties through meetings, correspondence, telephone calls and even formal hearings. In some cases, the proposed regulations are published in draft form for comment and criticism by those affected.

237 Supra, note 11 at 341.

238 Supra, note 155 at 834, f.n. 24.

Then on the question of satisfaction, even among those consulted, with the informal procedures in place in the late sixties, he continues:

Interestingly, the MacGuigan Committee was not aware that the Air Transport Association of Canada passed a unanimous resolution of no confidence in the Air Transport Committee of the Canadian Transport Commission, and demanded that formal rulemaking procedures be adopted in order that their views might be heard. Globe and Mail, November 4, 1969. 239

Later, he was to be much more specific, speaking in the context of consultation proposals in relation to a discussion paper, Structure of the Domestic Air Carrier Industry, released by the federal Ministry of Transport in September 1977:

These proposals for consultation demonstrate the fundamental weakness of informal consultation, in that all too often no adequate early opportunity is given to other than established interests to influence the development of policy. It is misleadingly simplistic simply to ask: "Is there consultation?" The real questions are: "With whom will there be consultation?" "At what stage of policy development will this consultation take place?" and "What will be the effect of all this consultation?" Moreover, without at least some degree of formality or structure, there is a very real danger that consultation in an atmosphere of intimacy will drift into dictation by corporate interests. This is particularly important in transport regulation because, as John Langford has noted, "Transportation policy-making at the federal level has always been characterized by an extremely close relationship between the transportation industry and its interest groups and the bureaucracies of the various agencies involved in the policy-making process". All in all, it would seem that it would be inadvisable to leave consultation and participation in policy-making to a totally informal process. 240

239 Id.

240 Supra, note 11 at 95.

I have not conducted an empirical study of the consultative practices of Ontario government departments or agencies before rule-making or policy formulation. However, those studies that were available to me indicate some support for Professor Janisch's views. Cowan speaks of the lack of consideration for the public interest that characterizes the Ontario Securities Commission's consultation with "interested" parties over draft policy statements, though the cause of this may in fact be a lack of public interest.²⁴¹ A study of the Ontario Milk Marketing Board in Government Regulation: Issues and Alternatives 1978, a document produced by the Ontario Economic Council, suggests that the Board has not been "perfect" in explaining its actions to the public.²⁴² Larry Fox reports that the Board rejects this criticism as resulting from inadequate inquiry but then goes on to state that, while the Consumers' Association of Canada, Ontario Branch, receives material from the Board in relation to proposed price increases, that material is less than useful in allowing for effective intervention in policy-making:

The statistics are only helpful when the rationalization of the policy behind them is clearly articulated so that the reason for a change may be ascertained and evaluated. 243

241 Supra, note 11 at 774. See also Professor Connelly's paper, supra, note 191 and the earlier section of this paper indicating the extent of "notice and comment" type procedures presently used by the OSC.

242 Broadwith, Hughes and Associates, "The Ontario Milk Marketing Board: An Economic Analysis" in Government Regulation: Issues and Alternatives 1978 (Toronto: Ontario Economic Council, 1978) 67 at 96.

243 Supra, note 183, Chapter VII, section B.

With the Workmen's Compensation Board, as seen already, the Claims Adjudication Manual contains rules and policies developed internally by the Board and not even revealed publicly when made.²⁴⁴ In the development of water and air quality standards, the Ministry of the Environment seemingly makes no consistent attempt to consult the broader public. What consultation there is seems to be confined to experts and affected industries.²⁴⁵ The same is true of the Ministry of Consumer and Commercial Relations setting standards for elevating devices. It uses a committee of experts and those directly affected by the proposed standards, though the Ministry would evidently welcome greater public involvement.²⁴⁶ Presumably this same kind of desire has led the Ministry of Labour to undertake voluntarily the "notice and comment" procedure (described previously) that it presently uses when developing standards under the Industrial Safety, Construction Safety and Mining Acts.²⁴⁷ However, I am not aware of any other example of the use of such a device in Ontario.

244 Supra, note 186 at 49.

245 Supra, note 208 at 63 ff.

246 Id., at 70-71 ff.

247 Id., at 69-70. See also notes 185a and 210 for instances of advance consultation since this paper was written initially.

B. Factors Not Considered by McRuer

One factor, however, that McRuer does not discuss, unless cryptically when it talks of "unnecessary delay", is the cost of imposing rule-making hearings on administrative agencies and government departments. In one sense, delay is a cost if the marginal returns of taking longer to develop rules and policies are exceeded by the costs of having to wait longer for the development of other rules and policies, or to state it more bluntly, if the imposition of rule-making hearings makes the administrative tribunal less efficient in performing its overall regulatory task. This delay, of course, can be reduced and has been in the United States by the employment of more people in the regulatory process, but this also raises questions about the utility of rule-making procedures. Have the advantages secured by rule-making procedures exceeded the extra cost to the public purse (and, of course to those involved in the regulatory process -- the regulated and interested) in setting up rule-making procedures?

These questions are among the more intransigent ones in the whole area of regulation, and as noted in the Introduction, little empirical work or cost-benefit analysis has been conducted to measure the effects of the Administrative Procedure Act in these terms. However, it is still possible in the absence of such data to question with Janisch the end-product of a consultative process in which the principal participants are the regulating agency and the "industry" regulated. It presents no guarantee of adequate consideration of the broader public interest.

Whether a "notice and comment" procedure is the appropriate way to counter this suspected tendency is another matter.

One point of concern has to be whether opening up the process of formulation of rules and policies will, in fact, bring about greater public participation. Here one has doubts about the financial capacities and energies of various public interest groups that even now are stretched to the limit. Cowan talks of this in dealing with proposals for the adoption of a "notice and comment" procedure by the Ontario Securities Commission:

Provision for rule-making could only lead to a greater tendency by the regulated interests to fashion the content of the rules applicable to themselves ... The Commission is implicitly viewed as the protector or spokesman for the regulated interests. Rule-making would only aggravate this. It is suggested therefore that the Commission is not the proper forum for this task, that legislative objectives be made more clear, and that emphasis be placed on making explicit the Director's guiding standards in order that their merits may be subject to public scrutiny.

248

In some ways this type of argument assumes a theory of regulation espoused by some that it is better to act on no information or data than it is to search for data, particularly when the only data likely to be presented is one-sided.

However, it is perhaps too cynical to regard requests for greater input into policy-making and rule-making emanating from industry as simply reflecting a desire to advance the cause of the industry at the

expense of the public interest. It also assumes that there is always or almost always dissonance between the interests of those regulated and the public interest and that the regulatory agency or government department is generally incapable of making judgments about the worth of data presented by those regulated. Even more significantly, it is based on a theory that those regulated form a single, monolithic interest and that it is impossible to generate healthy regulatory tension out of the diverse interests of the group most directly affected.

Certainly, experience has taught that many of these things are sometimes the case. However, it is sufficiently removed from being a universal truth to enable it to carry much weight as an argument against rule-making hearings. Also, it must be remembered that the one thing that the availability of a "notice and comment" procedure ensures is a greater opening up of the administrative process. It becomes possible to actually see how and why the agency or department is acting, whether it is on the basis of no data or solely industry-supplied data, and the knowledge that this is so may encourage healthy tendencies towards greater diligence on the part of the rule-makers and the policy-makers. It also ensures that most major excesses will come to the attention of our present range of vigilant, if over-committed, public interest groups; provided, of course, the data is in intelligible form.

Of perhaps greater concern is the effect that the imposition of a "notice and comment" requirement on rule-making and policy-making might have on the actual use of rule-making and policy statements by administrative agencies and government departments. To impose procedural requirements for the development of both rules and informal policy statements may have the effect of driving those departments and agencies to greater use of, perhaps undesirable, case-by-case solution of problems and the development of law in the extended sense of both rules and policy.

There is in fact some evidence of this in the United States experience with the Administrative Procedure Act. Whether because of a desire to avoid the procedural mandates of the "notice and comment" procedure or because of a genuine belief that case-by-case development of law is the way to proceed, the National Labour Relations Board has rarely made use of its statutory power to promulgate regulations,²⁴⁹ and in this "avoidance" of the "notice and comment" procedures, it has been aided by the decisions of the United States Supreme Court in

249 See Schwartz and Wade, *supra*, note 216 at 94-96; Davis, 1970 Supplement to the Treatise, *supra*, note 11 at 6.17, 287-91; Merton C. Bernstein, "The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act" (1970), 79 Yale L.J. 571; C.J. Peck, "The Atrophied Rule-Making Powers of the NLRB" (1961), 70 Yale L.J. 729; C.J. Peck, "A Critique of the NLRB's Performance in Policy Formulation: Adjudication and Rule-Making" (1968), 117 U. Pa. L. Rev. 254.

Securities and Exchange Commission v. Chenery Corp.²⁵⁰ and NLRB v. Wyman-Gordon Co.²⁵¹

As a plethora of writing on this issue confirms,²⁵² this is by no means an easy problem, particularly as it also begins to raise some of the very difficult issues associated with the problem of when legislative action is more appropriate than the development of law through adjudicative, case-by-case processes. What is clear, as witness previous discussion in this paper, is that it is probably impossible to lay down by statute a satisfactory statement of when rule-making rather than adjudication is involved or should be required.²⁵³ What, therefore, has to be acknowledged is the necessity

250 (1947) 332 U.S. 194.

251 (1969) 394 U.S. 759. However, as Davis points out, though the order itself was upheld in Wyman-Gordon, six of the judges obviously disapproved of the NLRB going beyond that and laying down prospective rules in the context of individual adjudications (supra, note 249 at 290). Subsequently, there has been much judicial activity in the area of court-required rule-making. See e.g. Davis, Administrative Law of the Seventies, supra, note 6 at 6.13-6.13-1, 223-41 and 1977 Supplement at 77-83.

252 See Davis, id.; Bernstein, supra, note 249; Peck, supra, note 249; D.L. Shapiro, "The Choice of Rule-making or Adjudication in the Development of Administrative Policy" (1965), 78 Harv. L. Rev. 921; Glen O. Robinson, "The Making of Administration Policy: Another Look at Rule-making and Adjudication and Administrative Procedure Reform" (1970), 118 U. Pa. L. Rev. 405; R.F. Fuchs, "Agency Development of Policy Through Rule-Making" (1965), 59 Nw. U.L. Rev. 781; W.E. Baker, "Policy by Rule or Ad Hoc Approach -- Which Should It Be?" (1957) 22 Law and Contemporary Problems 658.

253 Davis made a tentative attempt in his 1970 Supplement, supra, note 11 at 6.13, 279 but does not appear to have pushed the matter further.

for court intervention and the development of common law principles when it is alleged that the obligations of a rule-making or policy-making procedure are being avoided by disguising rule-making or policy-making as adjudication. To do anything less would be to allow circumvention of a legislative judgment that in certain situations it is necessary to consult with all interested persons rather than the parties to a particular proceeding. Suffice it to say that this remains one of the outstanding problems of American law in this whole area, as evidenced by Professor K.C. Davis' 1976 Supplement to his Administrative Law Treatise, Administrative Law of the Seventies²⁵⁴ and further discussed in the 1977 Cumulative Supplement,²⁵⁵ though it seems that the NLRB alone of the major federal agencies remains intransigent in the non-use of rule-making. It is also probably pertinent to point out that this is a device that is realistically available only to bodies with an alternative adjudicative role. With an administrative agency or government department charged simply with developing standards and initiating programs, the alternative to rule-making and policy formulation is either unprincipled reaction to every separate situation or complete inactivity, which for the most part is simply not viable.

254 Supra, note 251

255 Id.

A related issue is raised by Professor Ison in his paper, Information Access and the Workmen's Compensation Board, when he deals with suggestions that:

To overcome the lack of published rules, ... public access to the adjudicative criteria of the Board could be improved by publishing more regulations. 256

This he regards as not being "really viable",²⁵⁷ describing the regulation-making process as "too cumbersome for use as a normal routine".²⁵⁸ He then goes on to state:

Thus the danger of any requirement that the Board should promulgate its adjudicative criteria and procedures as regulations is that compliance would, at best, be only partial. Inevitably, the use of less formal directives would still prevail. Moreover, there might be confusion within the Board (because the adjudicators would have to work with the regulations and with the less formal directives), and increased confusion outside the Board because the public availability of adjudicative criteria would be largely illusory. 259

I sense, in fact, two concerns here. The first is that discussed previously and confirmed also by Ison's dread that rule-making would lead to further involvement of lawyers in the WCB process, namely that enforced regulation-making would complicate unduly and render less effective the administrative process. The second, which is of more

256 Supra, note 186 at 49. This suggestion is found in The Administration of Workmen's Compensation in Ontario, Task Force Report, 1973 at 12 and 35.

257 Id.

258 Id.

259 Id., at 50-51.

relevance here and which is discussed by other Canadian commentators,²⁶⁰ is that formal rule-making is not desirable in every case and that, in many instances, administrative agencies proceed more satisfactorily if they adopt non-binding, tentative policies which can be altered readily in the face of experience with particular adjudications. In other words, there is a sense that when formal regulations are involved flexibility is lost, particularly when the agency cannot make its own regulations but has to proceed through Cabinet. Not only are regulations difficult to make, they are also difficult to alter. While there is little concrete evidence to substantiate this, some of this perceived difficulty could be lessened by giving, contrary to McRuer,²⁶¹ all administrative agencies the ability to make their own regulations. However, that would not entirely meet this criticism. For example, for what it is worth, legislative scrutiny would still be involved and this may tend to become more watchful if the agency rather than the Cabinet has made the regulations.

260 See e.g. Molot, supra, note 11 at 339-40; Atkinson, supra, note 11 at 204-10; Wilson, supra, note 11; Wexler, supra, note 11.

261 Supra, note 1 at 356-59. See 357 particularly:

Some statutes confer subordinate legislative power on bodies other than the Lieutenant Governor in Council or a minister, which may be exercised without the supervision of ministers. This is a breach of sound constitutional principles and gives rise to unjustified encroachments on civil rights.

Also, there are obvious advantages to the flexibility of being able to act in the form of a malleable, non-binding policy statement rather than in the form of a legally-worded, binding until changed prospectively, formal regulation. As Henry Molot points out in "The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion":

Policy statements or guidance rules permit a tribunal to experiment and test hypotheses without having to issue binding regulations or to pursue the time-consuming and uneven course of adjudication. 262

He also, using Judge Friendly's phrase,²⁶³ talks about an agency using informal statements

because it genuinely desires to test a policy that is not yet "ripe for precise articulation". 264

262 Supra, note 11 at 339.

263 Henry J. Friendly, "The Federal Administrative Agencies: The Need for Better Definition of Standards" (1962), 75 Harv. L. Rev. 863 and 1263 at 1297.

264 Supra, note 11 at 339. It has also been suggested to me by colleagues that there are other dangers in "notice and comment" procedures. One argument is that the formal opportunity for comment will lessen the concept of ministerial responsibility and agency and departmental responsibility, in that ministers, agencies and departments will be able to point to the public as really being to blame for any misguided rules. The other argument comes at the matter from almost an opposite perspective. If rules and policies had to be developed through a "public" "notice and comment" procedure, many administrative agencies would become far more political and conservative in the development of policies. At present, because of the absence of such public scrutiny, they can achieve much progressive reform that would not be possible in a more open, politicized arena. As with the argument that the imposition of procedures will discourage rule-making, it is difficult to assess the extent to which these concerns are legitimate. Political imperatives of the type identified will
(cont'd)

Nevertheless, to admit these advantages and the desirability of that informal process continuing, is not necessarily to preclude the possibility or even to question the value of imposing "notice and comment" requirements in relation to both formal regulations and non-legislative policy statements. Indeed, the voluntary acceptance of such hearings by bodies such as the CRIC in relation to policy statements says something for their usefulness.

Whether they should be universally required in such situations is a question to which I shall return later. What is already clear is that the question of universal requirement raises not only issues of efficiency, as suggested by Professor Ison, but also difficult problems of differentiation. What types of informal policy development should be covered? How do you prevent resort to case-by-case adjudication or less formal, less open policy-making as means of avoiding mandatory hearings?

264 (cont'd) possibly have effects in certain situations. It is unrealistic to think otherwise. Yet to a certain extent the conditions for their operation exist already with, on the one hand, a situation of informal consultation on many regulations and, on the other, fairly intense public scrutiny after-the-event of many regulations. It is therefore questionable whether the introduction of a "notice and comment" procedure would lead to a significant increase in the incidence of such factors. Moreover, as always, these arguments have to be balanced against the primary objective of "notice and comment" procedures -- better regulation because of better information generated by open decision-making.

C. The MacGuigan Committee

The discussion so far has been in the context of the McRuer Commission's rejection of the need for rule-making hearings in the province of Ontario. Before concluding this section and discussing the American experience in more detail there is some merit in returning to the MacGuigan Committee's consideration of this issue and the subsequent experience at the federal level.

Professor Arthurs gave evidence before the Committee, and in dealing with the promulgation of regulations, he made the following comments:

I now turn to the procedure by which regulations ought to be made. I have already touched on the virtue of providing for participation in the regulation-making process by those who are subjected to the cutting-edge of regulations. To the extent that a statutory order or instrument may be aimed specifically at a particular individual or a particular group, elementary principles of fairness seem to me to demand that an opportunity be given to that individual or group to be heard. This opportunity may be afforded by informal consultation, by an invitation to submit a brief or (alternatively, but not necessarily) by a full dress public hearing. In some cases, at least, such participation must follow rather than precede the promulgation of an order or a regulation, because of the potential for great damage to the public interest which would occur if the regulation were withheld until the consultative procedures had been exhausted. On the other hand, as a general matter of principle, participation by the governed in the process of government is likely to enhance the effectiveness of the regulatory scheme. And as a corollary, the sudden and unannounced emergence of a regulation affecting the lives or livelihood of individuals and groups is likely to produce in them a feeling of resentment and antagonism, and unwillingness to abide by the policies and practices proclaimed in the regulation.

265

It is noteworthy that, while generally supportive of the notion of rule-making procedures, Professor Arthurs does not go as far as advocating a general "notice and comment" requirement after the model of the APA provisions. Rather he speaks of varying needs in varying situations and, in a way, this sense of varying needs carries over to the Committee's Third Report and its failure to recommend mandatory general "notice and comment" or any similar procedure.

In the relevant section of its Report, the MacGuigan Committee spends a lot of time talking about the varying nature of regulations leading to varying appropriateness of consultation, more formal "notice and comment" procedures or simple unilateral action.²⁶⁶ Supportive evidence from the Department of Transport²⁶⁷ and Professor Albert Abel is relied upon²⁶⁸ as is Fuchs' 1938 Harvard Law Review

266 Supra, note 2 at 44-47.

267 Id., at 44. The Department distinguished between two "extremes", the regulation with an extremely complex and highly technical matter which affects a relatively small number of people "where formal procedures would not be useful" and regulations affecting a large number of people "where procedures would be beneficial". This is an interesting reversal of the traditional notion that "hearings" are more useful the fewer the people involved.

268 Id., at 45-46. Abel, relying on the Fuchs article, discussed four general types of rule-making procedure: "investigative", "consultative", "conference", "adversary". Which is appropriate in any particular circumstances depends on "a number of factors". He also talked about certain types of regulations where no advance consultation was necessary: open seasons and game limits for fishing, prescribed scales of fees or money levels.

article.²⁶⁹ The Committee also commented on the exceptions to the
APA "notice and comment" procedures:

We find the exceptions to these minimum requirements are as
significant as the requirements themselves. 270

However, as with McRuer, there is literally no discussion of the
effectiveness of the APA procedures. Instead, reference is made to
the United Kingdom situation and the McRuer conclusion on this issue,²⁷¹
before the Committee finally rejects the idea of "general application
minimum procedures respecting prior consultation or hearings"²⁷² in
favour of, first, encouragement to

widest feasible consultation, not only with the most directly
affected persons, but also with the public at large where
this would be relevant 273

and secondly, "consideration"²⁷⁴ in the drafting of regulation-making
powers in statutes

to providing for some type of formalized hearing or
consultation procedure where appropriate e.g. where all
affected parties may be easily identifiable and the matters
to be covered by the regulations lend themselves to a
hearing or consultation type of procedure. 275

269 Id., at 46-47.

270 Id., at 45.

271 Id., at 47-48.

272 Id., at 48.

273 Id.

274 Id.

275 Id.

Parenthetically, it may be remarked that the federal legislation and five recent Bills noted earlier which require "notice and comment"-type procedures represent what seems to be a genuine attempt on the part of those drafting legislation to consider the appropriateness of this alternative.

Unquestionably, it has to be acknowledged that the variety of legislative tasks performed by regulation-making is immense and this is accentuated still further when one adds to regulation-making in the strict sense of the word, policy statements, non-legislative directives, and interpretative rulings. Whether this leads inevitably to the conclusion that a general application procedural requirement is inappropriate, even if surrounded by exceptions is, however, by no means obvious. Judgment on that particular question will be postponed until the examination of the operation of the APA is concluded, this being something neither McRuer nor MacGuigan engaged in.

At this stage, however, it is perhaps pertinent to speculate on the extent to which the MacGuigan Committee was influenced in its decision against a general statutory procedure by its sense that prior scrutiny of regulations, by the Clerk of the Privy Council and the Minister of Justice, and subsequent scrutiny by the recommended legislative committee, would ensure the adequacy of regulations. Yet, as we have already seen, admirable though the work of the Joint Committee on Statutory Instruments has been, under the chairmanship of Senator Forsey and, until recently, Robert McCleave, MP (now Jed Baldwin,

MP), its mandate is not one which allows for the assessment of the substantive merit of particular regulations, a matter which is undoubtedly the direct focus of a "notice and comment" requirement. Substance arises but incidentally insofar as the Committee checks for unusual uses of power, and derogations from human rights and fundamental freedoms whether covered by the Canadian Bill of Rights or not.

Since the MacGuigan Committee Report at the federal level there has, as already seen, been a gradual increase both in the requirement by statute of "notice and comment"-type procedures and in the voluntary use of hearings on proposed policies and even procedures by some of the major regulatory agencies. Once again, as in the United States, there has as yet been no cost-benefit analysis of the worth of these hearings though their continuation either speaks to political imperative or to some sense of their worth. That the latter is a significant factor is perhaps most firmly evidenced by the CRTC's strong desire to move to "issue" hearings in telecommunications matters and its strong sense that the complex task of rate regulation will be handled far more satisfactorily if certain legislative-type judgments do not have to be made in the context of individual rate applications. It is also borne out by the following comment, made by Edgar Benson, Chairman of the CTC, in the course of the ATC domestic charter hearings on September 12, 1977:

Many regulations are promulgated by the ATC and the CTC without discussions with the industry and others interested or affected parties. However, it has been a long standing

practice of the Air Transport Committee to give notice to interested and affected parties of major or substantial changes to the Regulations. By doing so, the ATC is more able to assess the effect of the proposed change on the industry and others.

In addition, this method permits the ATC to have access to the expertise and expert opinion that may assist it in promulgating a more meaningful Regulation.

276

Such a statement by the chairman of one of the senior federal regulatory agencies speaks convincingly to the utility of "notice and comment" procedures, at least as far as eliciting responses from those directly affected by proposed regulations is concerned. Given the requirement that such bodies regulate in the public interest, further benefits might well be expected by formalizing the process and opening it up to the public generally.

CHAPTER V

THE ADMINISTRATIVE PROCEDURE ACT AND RULE-MAKING PROCEDURES IN THE UNITED STATES

A. Brief Historical Background

Professor Fuchs' 1938 article, "Procedure in Administrative Rule-Making" (referred to earlier)²⁷⁷ and another article written four years later in the Yale Law Journal by Professor K.C. Davis, entitled "The Requirement of Opportunity to be Heard in the Administrative Process",²⁷⁸ reveal that almost on the eve of the enactment of the 1946 Administrative Procedure Act, the American federal law in relation to rule-making hearings was very similar to present-day Canadian law. At common law, classification of the function as "legislative" was still sometimes fatal to an argument for an opportunity to be heard in any form. However, more sensitive courts

277 Supra, note 12 at 275-80 particularly.

278 (1942), 51 Yale L.J. 1093, particularly at 1112-15. See, however, Clark Byse, "Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View" (1978) 91 Harv. L. Rev. 1823 at 1829:

There is no suggestion in the legislative history of the section that it was declaratory of the common law or that it was a delegation of power to the courts to develop desirable procedural models.

were adopting a much more functional approach and not being distracted from the task of tailoring procedures to suit tasks by such buzz-words as "legislative", "executive", "administrative", "judicial" and "quasi-judicial". There also was an increasing recognition of the notion that a "hearing" did not always involve a trial-type or adjudicative-type procedure. At the legislative level "notice and comment" procedures for rule-making were beginning to be recognized and this was paralleled by a great deal of voluntary recognition by the agencies themselves.

From 1939 onwards the subject of rule-making procedures had also been before the Attorney General's Committee on Administrative Procedure, and it was as a result of a compromise between the 1941 recommendations of this Committee and the views of the American Bar Association, which had been developing since 1933, that the Administrative Procedure Act was passed unanimously by both Houses of Congress in 1946.²⁷⁹ The introduction of a general "notice and comment" procedure was therefore not something overly traumatic as far as the existing law and the

279 At the time of its enactment, the Administrative Procedure Act was the subject of a wealth of comment. For a good account of the legislative history of the Act, see "The Federal Administrative Procedure Act: Codification or Reform?" (1947), 56 Yale L.J. 670 at 670-74. This contains references not only to the relevant periodical literature but also the various congressional documentation. See also Robert W. Ginnane, "'Rule Making', 'Adjudication', and Exemptions under the Administrative Procedure Act" (1947), 95 U.Pa. L. Rev. 643. For a briefer history, see K.C. Davis, Administrative Law: Cases-Text-Problems (St. Paul: West, 5th ed., 1973) at 8.

expectations of those interested were concerned, though its ultimate impact on the development of administrative law and regulatory techniques in the United States has been phenomenal. In fact, as Professors Schwartz and Wade point out in Legal Control of Government: Administrative Law in Britain and the United States, it is ironic that such a significant "innovation" took place in the United States in the very year that it was abandoned in the United Kingdom with the repeal of the Rules Publication Act of 1893.²⁸⁰

B. The Basic Rule-Making Provision of the Act

The "notice and comment" procedure of the Act, originally section 4, now section 553, seems relatively clear and straightforward, though as will be seen it also manages to hide a number of significant difficulties. Basically what is called for is notice of proposed rule-making in the United States' equivalent of the Canada Gazette, the Federal Register. The notice, generally to be given at least thirty days before the effective date of the rule, is to include:

- (1) a statement of the time, place, and nature of public rule making proceedings [if any];
- (2) reference to the legal authority under which the rule is proposed; and

280 Supra, note 216 at 87.

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. 281

After the giving of this notice "interested persons" are to be afforded

... an opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity for oral presentation. 282

The agency is then obliged, after taking account of the material submitted to

... incorporate in the rules adopted a concise statement of their basis and purpose. 283

The section does, however, contain a number of exceptions. Totally excluded from its ambit are rules involving "a military or foreign affairs function of the United States"²⁸⁴ and also

... a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. 285

281 Section 553(b). Where the terms of the proposed rule are not published, the notice must give a sufficient account of the nature and details of the proposals so as to enable effective "comment". However, deficiencies in the original notice are capable of being cured in the rule-making proceedings. See Davis, Administrative Law of the Seventies, supra, note 6 at 6.01-1, 171-72 and 1977 Supplement at 58-59.

282 Section 553(c).

283 Id.

284 Section 553(a) (1).

285 Section 553(a) (2).

Also excluded, except to the extent that is otherwise provided for by statute, are

... interpretative rules, general statements of policy, or
rules of agency organization, procedure, or practice. 286

The section goes on to provide that the agency itself may ignore the Act's requirements if it

... for good cause finds (and incorporates the finding and a
brief statement of reasons therefor in the rules issued)
that notice and public procedure thereon are impracticable,
unnecessary or contrary to the public interest. 287

As well, the agency may avoid the publication of the required notice in the Federal Register if the proposed rule names the persons who are subject to it and those persons are either personally served with notice of the rule or otherwise have actual notice in accordance with the law.²⁸⁸

Aside from avoiding the section completely or the provision requiring publication of the proposed rule in the Federal Register, agencies are

286 Section 553(b) (A) .

287 Section 553(b) (B) . Note, however, that this exclusion and the previous one are related only to the "notice and comment" subsection as opposed to the previous two exclusions which are related to the whole section. This means that "the right to petition for the issuance, amendment, or repeal of a rule" provided for in section 553(e) applies to the latter two exclusions but not to the former.

288 Section 553(b) .

not required to follow the thirty-day notice provision in certain circumstances:

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

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The second of these exceptions affects those situations where particular statutes require a hearing or notice as to interpretative rules and general statements of policy, as well as other than general statements of policy which are generally subject to the Act.

Section 553 applies to what has been described as "informal rule-making". However, in a number of federal statutes, rules are in fact required to be made on the record after an agency hearing. In such situations, while the various notice provisions of section 553 apply, the scope of the opportunity for participation by those interested and the decisional obligations of the rule-maker are governed not by section 553(c) but by sections 556 and 557.²⁹⁰ These latter provisions are those which cover the taking of evidence and giving of decisions as well as the general responsibilities for compiling a record in formal adjudicative proceedings.

289 Section 553(d).

290 Section 553(c).

Also of significance is section 553(e) which provides that agencies are obliged to give interested persons the right to seek the "issuance, amendment, or repeal of a rule".²⁹¹ This subsection applies to all rules including those otherwise excluded from the operation of section 553, with the exception of the military and foreign policy, agency management and public property exclusions, a differentiation that Professor Davis finds perplexing.²⁹²

The definition section of the Act provides some assistance in relation to three of the terms used in the Act: "agency" and, as already seen in the definitional section of this paper, "rule" and "rule-making". "Agency" is defined broadly by the Act for the purposes of section 553. It

... means each authority of the government of the United States, whether or not it is within or subject to review by another agency, but does not include

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia;
- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) [specific sections of other statutes].

293

291 See note 287, supra.

292 Administrative Law of the Seventies, supra, note 6 at 6.01-10, 205.

293 Section 551(1).

"Rule" is also defined expansively to mean

... the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

294

"Rule-making" is then defined as being the process of an agency for "the formulating, amending or repealing" of a rule.²⁹⁵

Putting it in Canadian terms, the essence of the scheme is to allow input, by those interested, into the regulation-making and certain of the policy-making aspects of the executive branch of government -- Cabinet, individual ministers, government department officials, Crown corporations and administrative agencies. That input, though it may involve an oral hearing at the discretion of the rule-maker, need involve little more than a consideration of responses elicited from a placing of the proposed rule in the Canada or Ontario Gazette, except in those cases where more formal procedures are indicated in a particular empowering statute. In that case, what comes into play are the more elaborate provisions of a statute similar to the Statutory Powers Procedure Act and designed generally for adjudicative-

294 Section 551(4).

295 Section 551(5).

type hearings. Generally excluded from the operation of the normal procedures are, however, certain sensitive government areas and also mere interpretative bulletins, general policy statements and the development of procedural rules. Agencies and functions usually caught by the Act are also given the possibility of exemption if, for any good reason such as urgency, for example, public policy demands it.

C. Impact of Section 553 of the APA
and Proposals for Reform

A survey of the American periodical literature and the various administrative law texts some thirty-two years after the enactment of the Administrative Procedure Act reveals no suggestion at all that section 553 should be repealed. The extra workload it has imposed on many regulatory agencies and departments of state seems to have been accepted willingly because of the valuable information generated by the "notice and comment" procedure and, also in part, because of the fact that the opportunity for prior involvement in the development of rules has the tendency of defusing criticism and making those rules more acceptable politically.

Thus we find Professor Schwartz and Wade describing the "notice and comment" procedures as "most beneficial in practice".

This is largely because those subject to administrative regulation in the United States tend to be members of trade, business, or professional organizations which perform the routine task of scanning the Federal Register for relevant

notices of proposed rule-making and then, after alerting their members, send in materials supporting the organization's view to the agency concerned.

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In other words, the machinery works or is beneficial because there is a mechanism in place to make it work -- the professional lobbyists. Whether the lack of such a mechanism in the United Kingdom was partially responsible for the failure of the "notice and comment" provision in the Rules Publication Act of 1893 is another question, but it is of some significance that neither the McRuer Commission Report nor apparently Professor Wade, in advising it on this issue, considered the pertinence of this empirical data to the Canadian scene. While the professional lobby is not nearly as well-organized or as recognized in Canada (witness the lack of registration laws) as in the United States, there is every reason to believe that it would carry the responsibility of responding in this country to proposed rules in much the same way as it has in the United States.

Professor K.C. Davis, in Administrative Law of the Seventies, is equally enthusiastic about the appropriateness of the "notice and comment procedure". He simply asserts that "[t]he system is simple and overwhelmingly successful".²⁹⁷ These bold, unqualified statements of praise by leading academics do not seem to leave much room for

296 Supra, note 216 at 87.

297 Administrative Law of the Seventies, supra, note 6 at 6.01-1, 170.

questioning the usefulness of the procedure at the federal level in the United States. Yet, as observed earlier, there appears to have been little cost-benefit analysis of the effectiveness of the procedure, probably because determining the value of participation with respect to the ultimate quality of the rules produced may be verging on the impossible. The standard of criticism adopted would therefore appear to be the somewhat subjective one that because people and groups are participating, because information is being generated that might not otherwise be, and because rules are shaped by that participation and that information, the system is working. It is also perceived to be working because the delay to the administrative process through the "notice and comment" is not considered to be too great; yet the time allowed gives sufficient opportunity in most cases for the generation of enough data and an appropriate level of participation. While it must be repeated that these are not scientifically-based judgments, it is certainly difficult to quarrel with them from this distance, particularly when they are made by people pre-eminent in the field.

Moreover, some form of support for these judgments comes from the agencies themselves. Three facts particularly indicate general agency contentment with the procedures. First, according to Schwartz and Wade, writing in 1972,

[s]o far as the reported decisions reveal, the agencies have not abused their power to invoke the escape clause [i.e. "notice and comment" is "impracticable, unnecessary, or contrary to the public interest"]. The requirements of

section 4 have been dispensed with in only a minute proportion of the rule-making cases.

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Similarly, writing about the "interpretative rules, general statements of policy, rules of organization, practice or procedure" exception, they observe:

This exception too does not appear to have been abused. There are only a handful of cases in which agency reliance on the exception has been challenged, and the agencies have been upheld in all of them.

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Other writers have not been so persuaded as to the good faith of agencies in this regard,³⁰⁰ and to an extent, minimal use of the exceptions by the agencies may be explained by a fear of court review for wrongful use of discretion, rather than a sense of the usefulness of the "notice and comment" procedures.³⁰¹ On the other hand, this is a comment that could scarcely be true of the third fact, a growing incidence of voluntary use of "notice and comment" procedures outside

298 Supra, note 216 at 88.

299 Id.

300 See e.g. Manning Gilbert Warren III, "The Notice Requirement in Administrative Rulemaking: An Analysis of Legislative and Interpretive Rules" (1977), 29 Admin. L. Rev. 367 at 380-93 and also footnote 77 re the "good cause" exception.

301 See Warren, id., for a discussion of the extent of judicial intervention in the area of interpretative rules and general policy statements. See also K.C. Davis, Administrative Law of the Seventies, supra, note 6 at 6.01-11, 206-07 and the 1977 Supplement at 75-76.

of the areas of rule-making covered by the Act.³⁰² Of course, as Davis points out, there has been some movement towards the judicial imposition of rule-making hearings, notwithstanding that the rule is excluded from the "notice and comment" procedures provisions of the APA.³⁰³ However, the decisions are sufficiently tentative and ambivalent on this point as to in no way explain, for example, the Inland Revenue Service's frequent use of "notice and comment" procedures for issuing Treasury Regulations,³⁰⁴ even though it is not required by statute to do so. Davis also instances the 1971

302 See e.g. K.C. Davis, id., at 6.01, 168.

303 Id., at 6.01-8 to 6.01-9, 193-202 and the 1977 Supplement at 74-75. Quaere whether this judicial development will be affected by the recent significant decision of the United States Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defence Council (1978), 98 S. Ct. 1197. Here the Court reversed a Court of Appeals decision invalidating a nuclear power plant licence on the ground of failure to explore certain issues sufficiently. The judgment represents a condemnation of court-imposed procedures additional to those provided for in the APA. To quote Professor Richard B. Stewart:

Finding that the NRC had fully complied with the "notice and comment" procedures for informal rulemaking specified in the APA, the Court enunciated the broad principle that federal reviewing courts with rare exceptions, are not empowered to require that federal administrative agencies employ formal decision-making procedures beyond those specified by Congress in the APA or in specific statutes.

See "Vermont Yankee and the Evolution of Administrative Procedure" (1978), 91 Harv. L. Rev. 180 at 1808-09. For other comments on this case, see Byse, supra, note 278 and Stephen Breyer, "Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy" (1978), 91 Harv. L. Rev. 1833.

304 Id., at 6.01, 168

adoption of a regulation by the Department of Agriculture making the "notice and comment" procedures of section 553 applicable to its rule-making in the areas of "public property, loans, grants, benefits, or contracts", categories normally excluded by the Act.³⁰⁵ In this respect, it may well be that the reluctance of the National Labour Relations Board to engage in rule-making, a matter discussed earlier, should either be regarded as an anomaly or as stemming from the Board's perception that adjudication is a better way for it to develop policy, rather than from a wish to avoid the inconvenience of section 553 procedures.

Thus, from the evidence available it appears that there is little or no public or agency pressure for the repeal of section 553, but rather a general sense that such procedures are in fact extremely valuable. Indeed, so important do rule-making procedures seem to have become that most of the movement towards reform is in the other direction.³⁰⁶ Thus we find critics such as Davis urging that the exceptions to section 553 be narrowed dramatically:

Unfortunately, a large portion of all legislative rules are issued without party participation, because of the many exceptions to s. 553. Congress should and probably will scale down those exceptions.

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305 Id., at 6.01-10, 205.

306 Significantly, as the citations which follow indicate, these suggestions come from a broad spectrum of those involved in or observing the administrative process and especially the Administrative Conference of the United States.

307 Administrative Law of the Seventies, supra, note 6 at 6.01, 168.

Later he becomes more specific and refers particularly to the need to give close attention to restricting legislatively the ambit of the "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice" exception.³⁰⁸ This thrust has the support of other commentators who have also questioned the need for the "public property" exemptions.³⁰⁹ Also accepting the

308 Id., at 6.01-10, 204-05.

309 On the interpretative rule/general statement of policy exception, see A. Bonfield, "Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the APA" (1971), 23 Admin. L. Rev. 171; Warren, supra, note 300; Michael Asimow, "Public Participation in the Adoption of Interpretive Rules and Policy Statements" (1977), 75 Mich. L. Rev. 520; Charles H. Koch, "Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy" (1976), 64 Geo. L.J. 1047; Comment, "A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy" (1976), 43 U. Chi. L. Rev. 430. On the public property exception, see A. Bonfield, "Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts" (1970) 118 U. Pa. L. Rev. 118. Interestingly, Bonfield, who finds no necessity for retaining the public property exception, was basically in favour of retention of the interpretative rule/general statement of policy exception. Later, in discussing the Iowa statute, he appeared to change his mind on interpretative rules and general statements of policy. See "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process" (1975), 60 Iowa L. Rev. 731 at 858-60. It is also significant that Davis, while in favour of extensive contraction of the categories of exception, has great difficulty with how to modify satisfactorily the interpretative rule/general statement of policy exception. See his letter to the Senate Subcommittee on Administrative Practice and Procedure reproduced under the title "Revising the Administrative Procedure Act" (1977), 29 Admin. L. Rev. 35 at 46-47. The military and foreign affairs exception has been downplayed in the paper because of its lack of relevance to Ontario. However, there have also been suggestions that this be eliminated or modified. See A. Bonfield, "Military and Foreign Affairs Function Rule-Making under the APA" (1972),
(cont'd)

the need for reform in these areas is the Administrative Conference of the United States, a statutory body established in 1964 consisting of government and agency officials, practising lawyers, academics and others "especially informed" about federal administrative procedure.³¹⁰ This organization has had a considerable impact on administrative practices.

At its Fifteenth Plenary Session in December 1976, it urged administrative agencies to use the "notice and comment" procedures of section 553 before issuing, amending or repealing an interpretative rule of general applicability which was likely to have a "substantial impact" on the public.³¹¹ In doing so, the Conference noticed that it was frequently extremely difficult to distinguish interpretative rules from substantive rules actually subject to the Act. Earlier, in 1969, the Conference recommended the removal of the "public property"

309 (cont'd) 71 Mich. L. Rev. 221. In 1970, the American Bar Association also recommended elimination of the public property exception and modification of the military and foreign affairs function. See the text of the resolution at (1972), 24 Admin. L. Rev. 391-92. There have, however, been no suggestions for removing the "agency management or personnel" exception as far as I have been able to ascertain.

310 See K.C. Davis, 1970 Supplement, supra, note 11 at 1.04-5, 9-11 for a discussion of the creation and role of the Administrative Conference.

311 See Recommendation 76-5. The text is set out in Asimow, supra, note 309 at 578.

exception to section 553, principally on the basis that rules of that type may "bear heavily upon non-government interests".³¹²

As well as this advocacy of the removal or restriction of some of the present exemptions to the operation of the Act, there has also been a growing consensus that the present provisions of the Act are not always completely adequate to ensure the appropriate level of public participation in the rule-making process.³¹³ Thus we find the following statement in a note in the 1974 Harvard Law Review, a statement which tends to reflect the views of most people writing in this area, including Professor K.C. Davis:

While most authorities agree that a trial-type hearing is normally inappropriate for rule-making, there is now some recognition that notice-and-comment procedures alone may not be satisfactory in all rule-making situations. Intermediate procedures, such as legislative-type hearings or trial-type hearings limited to certain factual issues may sometimes be useful.

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312 See Recommendation 69-8 (formerly 16). See also Recommendation 73-5 in relation to modifying the military and foreign affairs exception.

313 See e.g. Richard B. Stewart, *supra*, note 303 at 1805, who talks about the rule-making procedures of the APA as an "obsolescent model"; William F. Pederson Jr., "Formal Records and Informal Rulemaking" (1975), 85 Yale L.J. 38 at 39 ("The procedures used in rule-making have not kept pace"); Robert W. Hamilton, "Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rule-making" (1972), 60 Calif. L. Rev. 1276; Note, "The Judicial Role in Defining Procedural Requirements for Agency Rule-making" (1974), 87 Harv. L. Rev. 782 at 796; Charles H. Koch, Jr., "Discovery in Rule-making", [1977] Duke L.J. 295.

314 Id.

In addition to the specific suggestions made in this quotation, the same type of unease with the efficacy of the present relatively bare procedures has led to further suggestions, such as the need for a discovery system to be attached to rule-making,³¹⁵ the imposition of a requirement that there be formal rules governing the compilation of a rule-making record,³¹⁶ and the desirability in some instances of there being mandatory consultation even before the proposed rule is published in the Federal Register.³¹⁷

Not only has this sense of the increasing inadequacy of the APA in certain contexts come from the academics and other observers of the administrative process, but it has also obviously been accepted by the legislators and the agencies themselves. Thus we find Robert W. Hamilton, writing in the 1972 California Law Review:

It has not been generally recognized, however, that Congress, during the last decade, has evinced serious misgivings about pure notice-and-comment rule-making ... most statutes enacted during this period require some procedures in addition to pure notice-and-comment rulemaking. 318

He then goes on to deal approvingly, for the most part, with these congressional initiatives.³¹⁹ The reasons for this action in the

315 See e.g. Charles H. Koch, Jr., supra, note 313.

316 See e.g. William F. Pederson, Jr., supra, note 313.

317 See e.g. Robert W. Hamilton, supra, note 313 at 1330.

318 Id., at 1277.

319 I say "for the most part" because Hamilton makes it abundantly clear that the imposition by Congress of "on the record hearings" in certain circumstances has been a dismal failure. Id., at 1312.

last fifteen or sixteen years are not hard to identify either. The massive growth of regulatory agencies in the United States and the search for new ways of handling problems has, of course, been a major contributing factor. This has led, since the early sixties in the United States, to a movement away from solving regulatory problems through the adjudicative process, to rule-making as a prime regulatory device. Moreover, this movement is one that has affected not only the drafting of legislation establishing new regulatory schemes and agencies, but it has also permeated the "old" regulatory agencies as well. Thus, it is not uncommon to find regulatory agencies moving voluntarily beyond the requirements of the APA.

The federal courts have also in their wisdom seen fit to expand the parameters of rule-making procedures.³²⁰ As we have seen already, there has been on the part of some courts, for example, a strong movement in the direction of requiring rule-making hearings in relation to certain types of interpretative and procedural rules, notably those which have a "substantial impact" on private rights and obligations.³²¹

320 See e.g. K.C. Davis, Administrative Law of the Seventies, supra, note 6 at 6.01-3, 177-81 and 6.01-5, 6 at 183-93 and 1977 Supplement at 72-74; Note, 87 Harv. L. Rev. 782; Stephen F. Williams, "'Hybrid Rulemaking' Under the Administrative Procedure Act: A Legal and Empirical Analysis" (1975), 42 U. Chi. L. Rev. 401; J. Skelly Wright, "New Judicial Requisites for Informal Rule-making: Implications for the Environmental Impact Statement Process" (1977), 29 Admin. L. Rev. 59. However, all of this must now be read in the light of the Vermont Yankee decision, supra, note 303.

321 Supra, notes 301 and 303 and accompanying text.

Some courts have also accepted that the procedures laid down in section 553 should be treated as a minimum code and have moved in the direction of requiring much fuller participatory rights, where, for example, rule-making involves the determination (as it often does) of narrow and precise adjudicative-type facts.³²² This includes at times an obligation to respond positively to a request for the right to cross-examine with respect to specific facts.³²³ The concept of a rule-making record has also begun to emerge in some of the litigation.³²⁴ The courts have also had a crucial role to play in giving content to such obligations in the APA as those to give "notice" of proposed rule-making,³²⁵ give "an opportunity to participate"³²⁶ and "incorporate in the rules adopted a concise statement of their basis and purpose".³²⁷

It must, however, be pointed out that not all of the concerns of the American courts in this area have to do with increasing the participatory rights of those involved in the rule-making process. For

322 See e.g. Davis, Administrative Law of the Seventies, supra, note 6 at 6.01-3, 177-81.

323 Id., at 6.01-5, 6 at 183-93 and 1977 Supplement at 72-74.

324 See, particularly, William F. Pedersen, Jr., supra, note 313.

325 Davis, Administrative Law of the Seventies, supra, note 6 at 6.01-1, 169-172 and 1977 Supplement at 58-60.

326 Id., 1977 Supplement at 6.01-1-1 at 59-60.

327 Id., at 6.01-2, 172-76 and 1977 Supplement at 60-68.

constitutional reasons, and particularly because of the separation of the executive branch of government from the legislative branch, and the separation or independence of the agencies from both the executive and the legislative branches in the United States, the courts have assumed a fairly activist role in the scrutiny of legislative rules with a view to testing their validity. As a result of a desire to fulfill this role in the most effective way possible, the courts have been concerned to develop such obligations as the compilation of a rule-making record. Thus, not only in the judgments in this area,³²⁸ but also in much of the academic writing,³²⁹ many of the procedural issues are talked about as much in terms of the facilitation of judicial review as in terms of promoting better rules through greater opportunity for participation.

Nevertheless, this must not be overplayed in terms of seeing potential differences between the needs of the American and Canadian systems. To take the example of the compilation of a rule-making record again, while much of the focus of the discussion of this issue

328 Thus, even in Vermont Yankee, supra, note 303

the Court did acknowledge that courts may determine whether the administrative "record" developed in notice and comment rule-making is adequate to permit judicial review of the merits, and may remand for further administrative proceedings when the record is inadequate.

See Richard B. Stewart, supra, note 303 at 1809.

329 This, for example, is the major concern of Pederson, supra, note 313.

tends to be on the needs of the judicial review process, it is also contended that the requirement of a rule-making record would increase the efficacy of the rule-making process as well. According to William F. Pederson Jr., writing in the 1975 Yale Law Journal:

A requirement that an agency be judged on a single, comprehensive, detailed justification for its decision, prepared at the time when it promulgates a rule, would have several potentially beneficial effects. It would force the various subunits within the agency to pursue their differences on questions of fact, interpretation or policy until they could be resolved. It would force the agency to choose between alternative data, theories and methodologies and create a coherent case upon which scrutiny by the courts can be focused ... The stated justifications for a rule will be less comprehensive and thoughtful if there is the possibility that they could be supplemented with other material on review.

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To these points can also presumably be added that the systematic compilation of a publicly accessible record, as part of the ongoing rule-making process, may increase dramatically the efficiency and value of public participation. Repetition will be discouraged and the real issues will be more readily apparent in many cases.

To someone coming from the Ontario system, where no rule-making procedures of any kind are statutorily-mandated, and possessing a sense that the adoption of rule-making procedures will not only be costly but cause enormous delays in the administrative process, all of this movement or suggestion for movement beyond what is provided for in the Administrative Procedure Act is, in some ways, quite staggering.

Yet is it a notable characteristic of most of the writings in the area how conscious the advocates of development are of the necessity that such procedures "must be balanced against the need to conduct government efficiently, expeditiously, effectively and inexpensively".³³¹ However, what presumably has to be realized is that efficiency, expedition, effectiveness and economy are not necessarily decreased by requiring procedures in addition to those mandated by statute.

In this light, it is interesting to reflect on a recent recommendation by the Commission on Federal Paperwork to the Administrative Conference and also to Congress.³³² This was to the effect that the APA be amended so that there would be greater opportunity for input by those likely to be affected at the early stages of the drafting of proposed rules.³³³ Presumably, the reason for this recommendation was with a view to making it more likely that the proposed rule, published eventually in the Federal Register, would be acceptable to most people, thereby reducing the paperwork at the section 533

331 Arthur E. Bonfield, "Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the APA", supra, note 309 at 118-119.

332 A Report of the Commission on Federal Paperwork: Rule-making (Washington: U.S. Government Printing Office, 1977).

333 Id., at 4, Recommendations Nos. 1 and 2. See also 14, where the Commission talks about the possibility of the real decisions having been made before the "notice and comment" stage.

rule-making stage. The Commission also accepted without question the premise that public participation in rule-making produced better rules, and went on to recommend:

Agencies should, when feasible, make use of participatory rule-making and should compile an informal record reflecting procedures and factors considered in setting rules. 334

According to the Commission, in justification of the recommendation:

The necessary paperwork which would be added through greater participation in rule-making is temporary. It ends when a proposed rule is put into effect. The "bad" paperwork of a poorly written rule which is allowed to go into effect, however, can be endless. 335

These same considerations also led the Commission to recommend the encouragement of public participation in evaluating the effectiveness of rules and the application of "notice and comment" procedures for agencies proposing reporting forms.³³⁶

What also deserves to be noted in this context is the almost universal rejection by commentators of the utility of trial-type procedures for the development of rules.³³⁷ The most frequently-cited example of

334 Id., at 48 (Recommendation No. 16).

335 Id. See also 46, where the Commission justifies in the same terms the use of procedures more extensive than "notice and comment" in certain situations.

336 Id., at 49 (Recommendation No. 17).

337 See K.C. Davis, Administrative Law of the Seventies, supra, note 6 at 6.06, 222-231; Hamilton, supra, note 313, seriatim and particularly at 1312. Davis reports:

The Administrative Conference said in Recommendation 72.5 that it "emphatically believes that trial-type procedures
(cont'd)

the excesses that this produces is the famous "peanut butter" case.³³⁸ The Food and Drug Agency proposed that peanut butter should have to contain 90% peanuts to justify the use of the designation "peanut butter". This was published in the Federal Register on July 2, 1959 and some twelve years later on March 3, 1971, the FDA published a notice in the Federal Register making the rule effective in thirty days. In the meantime, there had been an extensive public hearing, as required by section 371(3)(3) of the federal Food, Drug and Cosmetic Act,³³⁹ producing 7736 pages of transcript as well as interminable informal discussion between the agency and the industry, and court proceedings all the way to the Supreme Court of the United States. In this "horrible example",³⁴⁰ the most dramatic fact is the length of time it took to bring the rule into effect. However, as Hamilton chronicles in his California Law Review article, there are other

337 (cont'd) should never be required for rule-making except to resolve issues of specific fact". The Conference in Recommendation 71-7 laid down standards for "Rule-making on a Record by the Food and Drug Administration" but in doing so it said: "The general consensus of observers of the FDA is that in the past this procedure, often described as "rule-making on a record", has worked poorly."

338 See the account of this case in Joseph C. Goulden, The Superlawyers (New York: Dell, 1973) at 191-95. See also K.C. Davis, Administrative Law: Cases-Text-Problems, supra, note 279 at 245-46; R. Hamilton, "Rule-making on a Record by the Food and Drug Administration" (1972), 50 Tex. L. Rev. 1132. In fact, the saga still continues. See Regulation for November-December 1978 at 6-7.

339 21 U.S.C. (1938).

340 K.C. Davis, supra, note 338 at 245. In the 1977 Supplement, he describes the proceedings as "nonsensical", supra, note 6 at 77.

examples of the incredible inefficiency of trial-like procedures for handling rule-making and he evidences, inter alia, the 36,000 pages of transcript produced in the first phase of a rule-making proceeding known as Foods for Dietary Uses, which lasted between 1964 and 1972.³⁴¹

In total, somewhere around fifteen federal statutes seem to require formal trial-type or "on the record" hearings for rule-making and this is also a requirement in a number of the state administrative procedure statutes.³⁴² The reaction of commentators to them has almost universally been negative. According to Hamilton:

The actual agency experience with these procedural requirements raises serious doubts about their desirability. At best, some agencies have learned to live with them, even though preferable procedures are probably available. At worst, these procedures have warped regulatory programs or resulted in virtual abandonment of them ... In practice, therefore, the principal effect of imposing rule-making on a record has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action. 343

These remarks have been echoed by both Pederson³⁴⁴ and Davis³⁴⁵

341 Supra, note 313 at 1287. See also his earlier article, supra, note 338 at 1148.

342 See Hamilton, supra, note 308 at 1278-83 for details of the federal statutes as of 1972. In the original Treatise, supra, note 5 at 6.04, 372, Davis lists the statutes of Iowa, Massachusetts, Minnesota, Nebraska, Ohio, Virginia and Wisconsin as requiring hearings.

343 Id., at 1312-13.

344 Supra, note 313 at 44.

345 Administrative Law of the Seventies, supra, note 6 at 6.06, 222, reiterating his claim in the original Treatise, supra, note 5, 6.06, 379.

and were the subject of strong recommendation by the Administrative Conference in 1972, wherein the Conference stated that it

... emphatically believes that trial-type procedures should never be required for rule-making except to resolve issues of specific fact. 346

Davis is also very anxious about the development of appropriate criteria by the courts in deciding upon the narrower issue of whether or not to require cross-examination in the course of rule-making procedure.³⁴⁷ Speaking of the tests suggested by some courts, he states:

The ideas of "crucial issues" and "critical points" seem somewhat unsatisfactory, for the crucial issue may be whether the public interest requires a particular broad policy, and that is precisely the sort of question on which cross-examination should be denied. 348

More specifically, in an extract quoted by the Commission on Federal Paperwork,³⁴⁹ another commentator has identified the failings of cross-examination in relation to legislative-type facts:

When honest, intellectual disagreements among scientists and engineers are removed from the realm of scientific inquiry and thrust into an adjudicatory arena, the very nature of the investigation undergoes a sometimes subtle change. What was once a methodical search for scientific principle how becomes a trial to find out who is "telling the truth" with all the attendant moral implications that it encompasses. 350

346 Id.

347 Id., at 6.01-5, 183-90. See also Williams, supra, note 320 at 436-48 and the cross-examination aspect of the Innisfil case, supra, note 94.

348 Id., at 190.

349 Supra, note 332 at 13.

350 Barry B. Boyer, "Alternatives to Administration Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues" (1972), 71 Mich. L. Rev. 111 at 128, n. 61.

Thus in all the talk about the deficiencies of the Administrative Procedure Act, there is no question as to the undesirability of converting the procedures of section 553 into adjudicatory-type hearings. Rather, the current concern reflects discontent with the fact that the Act has too many exceptions and also sets up only two models, the "notice and comment" procedure at one extreme and a trial-like adjudicatory hearing at the other. The present search is perhaps one for other models, yet it is remarkable how seldom the criticisms are converted into specific proposals for amendment to the Act.

If we look first at the exemptions to the Act, the critics seem reasonably agreed on the complete elimination of the "public property" exception,³⁵¹ but with respect to the "interpretative rules, etc." exception, while there is a sense of need for amendment and greater participatory opportunity, specificity is lacking. The Administrative Conference has moved in the direction of "postadoption notice and comment" procedure, except where an interpretative rule of general applicability or a statement of general policy is "likely to have substantial impact on the public", in which case section 553 has to be followed.³⁵² However, as the cases up until now seem to have demonstrated, the parameters of the "substantial impact" test as developed by the courts on a common law basis have by no means been

351 Supra, note 309.

352 Supra, note 311.

settled clearly.³⁵³ This lack of clarity in the common law has caused Professor Davis, in a submission to the Senate Committee on Administrative Procedure and Practice, to simply call for further study of this problem.³⁵⁴ The caution of those wanting change in this area has, to a large extent, been induced by a concern that the wholesale abolition of these exceptions would increase dramatically the number of situations in which section 553 would have to be followed, with, in many instances, much cost and little or no gain to the administrative process because of a lack of public interest or concern about many internal rules and policies of agencies. As well, and perhaps more importantly, it is thought that at a time when agencies need to be encouraged to engage in more rule-making and policy-making, such a change might act as a serious disincentive.

The same caution permeates, to a large degree, discussion of adding procedural requirements to the Act. Aside from the issues of discovery rules and defining a rule-making record to be compiled by administrative agencies, the general thrust of proposals for this kind of reform seems to be in the direction of the tailoring of specific statutes to deal with specific rule-making situations, and perhaps

353 See K.C. Davis, Administrative Law of the Seventies, *supra*, note 6 at 6.01-8, 9, 195-206 and 1977 Supplement at 74-75; Warren, *supra*, note 300 as well as the other articles on interpretative rules listed in note 309, *supra*.

354 Supra, note 309 at 47.

otherwise leaving it for the courts to develop on a common law basis.³⁵⁵ This is also true of another issue that is discussed frequently in the American literature in rule-making, that of whether or not rule-making should be positively required in certain situations. The problem seems to be in defining in a general statute what the certain situations should be, and so this too has until now been left to common law development and requirement in specific acts, with little or no suggestion that the APA should be amended to deal with this question.³⁵⁶ To quote Professor Jerre S. Williams:

Even the most adamant advocates of the use of the rule-making procedure recognize that no hard-and-fast rule can be made. Policy must be made on occasion by litigation and adjudication before the administrative bodies ... No agency can anticipate all possible circumstances and deal with them by rule. 357

- 355 See, e.g., Hamilton, supra, note 313 at 1330-31, particularly where he suggests that the "polar" approach of the APA ("notice and comment" or "adjudication") be done away in favour of an individualistic approach backed by certain legislatively-accepted general principles.
- 356 This issue is discussed at length by Davis. See 1970 Supplement to the Treatise, supra, note 11 at 6.13, 14, 278-82; Administrative Law of the Seventies at 223-40; 1977 Supplement at 77-83. Indeed, in the 1970 Supplement at 279, Davis puts forward a tentative draft statute but this idea does not appear to have caught on and he has not returned to it subsequently.
- 357 "Securing Fairness and Regularity in Administrative Proceedings: American Procedures and Their Efficacy" (1977), 29 Admin. L. Rev. 1 at 13.

D. Rule-Making in the States

This section of the paper and the research in which I have engaged has concentrated almost exclusively on rule-making procedures at the federal level in the United States. Suffice it to say that the Model State Administrative Procedure Act developed first in 1946 by the ABA and the National Conference of Commissioners on Uniform State Laws,³⁵⁸ and revised substantially in 1961, contains a "notice and comment" requirement for rule-making and either the 1946 or 1961 Act has been substantially adopted in at least twenty-eight states plus the District of Columbia. As well, it has been influential in the development of administrative procedure legislation in a number of others.

There are similarities between the provisions of the Model State Act and section 553 of the APA. However, there are also significant differences. "Rule" is restricted to "general" statements in the definition section,³⁵⁹ but it does cover interpretative rules and

358 For the text, a brief history and reference to the extensive periodic literature, see Walter Gellhorn and Clark Byse, Administrative Law: Cases and Comments (Mineola: Foundation Press, 6th ed., 1974) at 1160-71. See also K.C. Davis, 1970 Supplement, supra, note 11 at 1.04-5, 6 particularly at 17-18. The statistics come from Administrative Law of the Seventies, supra, note 6 at 1.04, 9. There Davis refers approvingly to Bonfield's article on the Iowa Act, supra, note 309.

359 Section 1(7).

policy statements as well as rules of procedure.³⁶⁰ As well, the public property exception finds no place in the Act though there is an exemption in cases of "imminent peril to the public health, safety or welfare".³⁶¹ In terms of the procedure laid down, perhaps the most important distinction between the two Acts is that an oral hearing has to be held on proposed "substantive" rules if requested by twenty-five persons, an association having twenty-five members or a government department or agency.³⁶² In some states this has been carried further and adjudicative-type hearings are required in relation to all rules coming within the Act.³⁶³ This has been criticized strongly. For example, Professors Schwartz and Wade remark:

They appear to go too far, since only a minority of administrative rules involve matters which justify the expense and delay involved in even informal hearing procedures. 364

360 See section 3. Davis was very critical of this in the 1970 Supplement, supra, note 358 at 18. However, he now obviously thinks that there is room for modification of the interpretative rule/general statement of policy exception in the APA, supra, note 308.

361 Section 3(b).

362 Section 3(a)(2).

363 Supra, note 342.

364 Supra, note 216 at 112. See also Davis, supra, note 358 at 17.

E. Conclusions

From the research I have conducted, there is no doubt at all that the "notice and comment" procedure adopted in section 4 (now 553) of the Administrative Procedure Act of 1946 has become an entrenched part of the federal administrative procedure. The worth of such procedures to rule-making at the federal level in the United States seems to be acknowledged universally. That the statute is not perfect, at least now, some thirty-two years later, has perhaps to be admitted. The exemptions may be too wide. The alternative of a full adjudicative hearing when rule-making is required to be on the record is not acceptable. Nevertheless, much of the discontent with the present situation in relation to rule-making procedures seems to stem not so much from the Act itself as from the excesses of procedure provided for in some individual statutes, and the need for legislative draftsmen to pay more attention to devising alternatives in some situations between the informality of "notice and comment" and the formality of formal adjudicative-type hearings. There is also some concern that, at least in some instances, "notice and comment" opportunities come too late, and this has led to suggestions from a number of quarters for formal provision for an opportunity for public input at a stage prior to and during the actual drafting of the legislation.

Yet, to someone observing the American scene from the outside, despite all these proposals for reform both general and specific, one of the

striking things about the "notice and comment" procedure of the APA and perhaps one of the explanations for its seeming success is the modesty of its aims. Certainly, it does not cover even a majority of agency rule-making at the federal level in the United States. Certainly, it does not spell out very elaborate procedures. Certainly, it does nothing by way of mandating rule-making rather than adjudication in certain situations. However, if it had done any of these things, at least initially, it may well have been overreaching. Instead, because of its modest aims and comparatively low level of imposition on the overall work of the administrative agencies, it was readily tolerated and in time came to be seen as an extremely valuable adjunct to the administrative process. It may also be for that reason that many of the current proposals for reform are seemingly being treated with equanimity even on the part of the agencies.

CHAPTER VI

THE NEED FOR RULE-MAKING PROCEDURES IN ONTARIO

A. "Notice and Comment": The Competing Arguments

Recent experience at the federal level in Canada, and to a lesser extent in the province of Ontario, has pointed to a growing acceptance on the part of a number of administrative agencies both of the advantages of proceeding by way of policy statement and rule-making rather than by adjudication, and of seeking comments by those interested in proposed policies and rules. The procedures adopted in such cases have, in fact, gone from procedures less formal than even those of the APA, such as informal consultations with those regulated, through "notice and comment"-type procedures to full adjudicative-type hearings. Indeed, the hallmark of what has happened up to this point has been inconsistency, or perhaps more charitably and hopefully accurately, anxious experimentation.

The advantages of leaving individual departments and agencies to proceed on this voluntary experimental search for an appropriate level of participatory rule-making are not inconsiderable. First, the relatively recent growth of the rule-making and policy-making

phenomenon in Canada means almost inevitably that there is a fragility, at least with respect to aspects of it. To suddenly impose mandatory procedures for rule-making in Ontario may well cut off the growth of the use of such devices and send the agencies or departments concerned back to ad hoc decision-making or the development of policy through adjudication. As well, others contemplating innovation may be discouraged from starting. That this is a real fear is in fact borne out by the reluctance of many critics to recommend total abolition of the interpretative rule/general statement of policy exceptions of section 553 of the APA for this very reason. It also manifests itself in Professor Ison's rejection of the suggestion that the Ontario Workmen's Compensation Board engage in more regulation-making.³⁶⁵

365 Supra, note 256 and accompanying text. That this factor has influenced Davis is also clear from his criticism of the Model State Act just referred to, supra, note 358:

One of the major failings of many agencies is reluctance to clarify the law they administer. Everything should be done that can be done to encourage agencies to move toward earlier clarification. Two of the main methods that should be encouraged are interpretative rules and general statements of policy. Good legislation should avoid any kind of new barriers to issuance of interpretative rules and general statements of policy. The Federal Administrative Procedure Act wisely excepts from its requirements concerning rule-making procedure interpretative rules and general statements of policy.

Sections 3 and 4 of the Revised Model Act should contain such exceptions.

In Administrative Law of the Seventies, supra, note 6 at 204 and in his letter to the Senate Subcommittee, supra, note 309, he now obviously feels there is room for reduction of these exceptions to the APA without the side-effect of reducing "earlier clarification".

A second reason for not imposing a general procedural requirement for rule-making is that there are advantages in many instances to allowing the expert agency to reach by experimentation what it regards as an appropriate level of procedures for participatory rule-making. Indeed, much of the present discussion in the United States, as we have just seen, is with a view not so much to amending the Administrative Procedure Act, as to suggesting appropriate criteria by which the agencies themselves or legislative draftsmen might be guided. In other words, there is a sense in much of the writing that a general statute may not provide an appropriate level of sophistication or variety for the needs of particular agencies, and that individual attention against the background of some generally acceptable principles is the appropriate way for future growth in this area.

Indeed, if there is a strong argument to be made against the enactment of a general "notice and comment" procedure for rule-making in the province of Ontario, to my mind, it rests with these very points and not with the concerns expressed in 1968 by the McRuer Commission. First, I would suggest that reliance on the failure, in the early part of the twentieth century, of the English Rules Publication Act of 1893 is a far less reliable guide to the value of rule-making procedures than the modern experience of the federal agencies in the United States operating under the strictures of section 553 of the Administrative Procedure Act. Of course, it has to be admitted that in the province of Ontario, there is not nearly the same similarity to the regulatory scene in the United States as there is at the federal

level in this country. The major federal regulatory agencies in Canada are much closer to the United States models than anything comparable in the United Kingdom. Nevertheless, it is also abundantly clear that the present regulatory scene in Ontario is much more closely related to the United States of both 1946 and today than it is to the United Kingdom of the twenties and thirties, both in the nature of regulatory agencies, the areas regulated and the reaction of those regulated and the public to the process. This seems to me to be so even though much regulation in Ontario takes place through departments rather than regulatory agencies or boards.

Direct transplants of legislation from one country to another are, of course, always dangerous but there are clearly enough relevant experiences to be gleaned from the workings of section 553 of the APA to make it worthwhile considering as a possibility; something that the McRuer Commission, at least in its formal Report, never seriously did.

One of those relevant experiences is that, provided one does not move to full-scale adjudicative-type hearings but opts instead for the "efficiency, flexibility and broad participation"³⁶⁶ of section 553 of the APA, the likelihood is that the costs of the imposition of rule-making procedures will not be excessive either in terms of straight cash or efficiency of the administrative process. Certainly

366 Note, 87 Harv. L. Rev. 782 at 785.

some American critics have questioned the attention paid by at least some agencies to the submissions in rule-making procedures of the general public as opposed to the "industry" regulated,³⁶⁷ suggesting that opening up the process may be a waste of time if the industry regulated is already being consulted informally. Nevertheless, that certainly does not tend to be a comment made frequently, and in the vast majority of cases, the writers have been convinced that the adoption of section 553 of the APA has worked for the betterment of the administrative process in the United States. Of course, as mentioned a couple of times already, these judgments tend not to be based on rigorous cost-benefit analysis, if such is indeed possible in this area. However, the following summary of the perceived advantages of section 553-type procedures is impressive in the recital:

The primary reason that public participation leads to better rules is that it provides a channel through which the agency can receive needed education. Agencies are not omniscient and do not have all relevant economic and social data. They cannot anticipate all of the consequences and problems that will flow from the adoption of their rules. This sort of data is obtained by requiring the agency to solicit and consider public comments. The interviews conducted in connection with this study repeatedly indicated the practical value that agency personnel attach to public commentary,

367 See e.g. the comments of Professor Stewart on a visit to a large federal agency during a major rule-making proceeding cited by the Commission on Federal Paperwork, supra, note 332 at 15:

The bound presentations of regulated firms and a few well-heeled public interest litigants were in frequent use; a large heap of comments, generally ill-informed, from the citizenry at large had been dumped in a corner and ignored.

including that obtained in the course of adopting interpretive rules and policy statements. Public input also contributes to better rule-making by off-setting institutional biases that may exist in favor of or against the regulated group. Moreover, the public may be more likely to accept and less likely to sabotage a rule if it has been allowed to participate in its formation.

Public participation in rule-making also has values that transcend these instrumental ones. In our system of representative government, participation in governmental decision-making by persons affected by it is an affirmative good. This is particularly true in the case of administrative agencies, which are not as politically responsive as the legislature or the executive. Although theoretically subject to a variety of legislative, executive, and judicial controls, most agency action, and particularly rule-making, is not supervised at all. Agencies make laws affecting many interests behind closed doors; their impartiality and freedom from pressures are frequently questioned. Notice and comment procedures in rule-making are ideally tailored to increase the responsiveness of the agency and to facilitate democratic participation. They permit public participation at a critical moment in administration when law and policy are about to crystallize, and they provide a powerful tool by which persons who will be adversely or favorably affected by agency action can seek to influence that action in an open fashion. 368

The McRuer Commission was, of course, of the view that formal "notice and comment" requirements were unnecessary because those affected were already being consulted. Nevertheless, as developed in the section of the paper dealing with the Ontario practice in this regard, there seems to be a sense among critics that McRuer did not probe deeply enough on this particular question and that the answer to such a probe might have revealed some rather startling information about the true level of informal consultation and the fact that it was largely confined to the

regulated "industry" with resulting tendencies towards regulatory capture. Nevertheless, it is foolish to pretend that the significant amount of open policy and regulation-making that the Ontario Securities Commission, for example, has engaged in during the last two or three years has led to a dramatic influx of public participation as opposed to representation by the industry. From the information I have received, "outside" interventions in the "notice and comment" process are rare. It is also of probably no consequence that the notice of proposed rule-making appears in the OSC Bulletin rather than the Ontario Gazette.

On the other hand, it is questionable whether the present lack of "outside" participation should be all that significant a factor in deciding upon the need for a "notice and comment" statute. The habit of intervention and involvement seems to take a while to develop in any regulatory regime. Public participation may, in some areas, have to be seen to be actively encouraged by the regulatory agency. Also, the seeming lack of interest may be the result of lack of resources leading to the absence of an active public interest group in the particular area. If so, and if one accepts that outside public participation is a desirable objective for most regulatory processes, then the answer is clearly not rejection of "notice and comment" procedures but rather consideration of alternatives for encouraging public interest advocacy in particular areas -- cost awards by the agencies, greater government funding and so on. It also should be reiterated that, at the time when the McRuer Commission reported in

1968, the claims of public interest groups for recognition in the administrative process in Canada were far from having reached the peak achieved in the last few years, nor had the system (legislature, agencies, departments, courts) come anywhere close to the degree of recognition of those participatory claims as it has today.

Of course, the public interest group can be consulted informally as well as the regulated "industry". Yet, it is highly questionable in today's context whether that is good enough for either the public interest group or the "industry". The diverse interests of the regulated "industry" and public interest groups and, indeed, the diverse claims within a particular regulated "industry", would seem to demand more than mere informal consultation. There are, in fact, continuing indications that "industry" itself is not all that happy with a continuation of the system of informal consultation. Thus, in the Globe and Mail of November 21, 1978, Michael Kirby, President of the Institute for Research on Public Policy, advocated public hearings on all new regulations as part of a business "bill of rights" aimed at reducing regulatory "chaos" and particularly frustration of business expectations caused by sudden regulatory change.³⁶⁹

369 See "Less Regulation of Businesses is Requested".

In this respect, the only guarantee that certain regulatory issues will be considered adequately on the basis of responsive, competing submissions is to adopt open decision-making, something which a "notice and comment" procedure may ensure in some measure but which informal consultation cannot. Indeed, informal consultation, particularly where there are diverse interests involved, could in fact lead to greater regulatory cost if attempted seriously than would result from the adoption of an efficient "notice and comment" procedure. Of course, not all problems of this kind can be solved by "notice and comment"-type procedures. Openness may still not be acceptable to certain regulated groups, and as was reported to me by one former chairman of an agency outside of Ontario, the adoption of "notice and comment" in his tribunal generated many attempts at off-the-record discussion. One must assume, however, the good faith of the agency in resisting such blandishments.

If the McRuer Commission's concerns with the adoption of a general "notice and comment" procedure are seen to be of decreasing significance some ten years later, one is then led back to the concerns that I identified at the outset of this section: "notice and comment" would act as a disincentive to the adoption of rules and policies, and individual agency or department development of rule-making procedures is likely to lead to a more satisfactory resolution of what is appropriate than would the imposition of a general statute.

It is, of course, difficult to predict the degree to which a general statute would lead to a lessening in the extent of rule-making and policy-making. However, there are devices available to ensure this effect is reduced. First, the procedures, as in the United States, need to be kept at least initially to a basic minimum consistent with producing effective or valuable participation. Secondly, careful attention should be paid to the drafting of exceptions so that not every internal rule, directive or employment instruction within an agency or department becomes subject to the procedural requirements of the statute. Thirdly, where it is felt necessary, individual statutes could perhaps be amended to compel rule-making and the development of policy statements in certain situations. These suggestions aside, there is presumably a lesson for many departments and agencies in the extent to which some authorities have moved voluntarily towards "notice and comment" with, to put it least strongly, no sensible diminution in their regulatory effectiveness.

It also has to be acknowledged, however, that despite the degree of voluntary recognition of "notice and comment", it will probably be a very long time before there has been general acceptance of some form of public rule- and policy-making by all Ontario agencies and departments. If that is accepted, the question then becomes whether it is worth waiting and also whether waste might not be involved in the costs of individual experimentation and evolution when a procedure, which has proved generally useful in the United States, could be adopted right now. On this issue, it is staggering to note that, in

an interview with a reporter from the Toronto Star appearing in the January 9 issue of this year, Mr. Jed Baldwin, MP, presently one of the joint Chairmen of the Senate-Commons Committee on Statutory Instruments, stated that of the 3,000 Orders-in-Council referred to that Committee in the last three or four years, the Committee had queried or objected to about 1200 of them.³⁷⁰ Not only is this a sign that prior scrutiny of federal regulations by the Clerk of the Privy Council and the Justice Department is not particularly effective, but it also suggests a grave necessity for improving the way in which subordinate legislation is in fact promulgated. Indeed, the statistic is even more remarkable when one realises that the Committee's mandate is not to consider the policy or worth of a particular regulation, save as might be permitted by inquiring into whether it offends the Canadian Bill of Rights or constitutes an unusual use of the regulation-making power in question.³⁷¹

All in all, it is my sense that the interests of openness in rule-making and encouragement of more effective "industry" and greater public participation in that process, with the target of better "rules" in view, lead very strongly in the direction of adoption of a general "notice and comment" statute for the province of Ontario. Most of the balance of this paper will be devoted to a consideration of the details

370 See "Orders-in-Council: Is Canada Ruled by Fiat?"

371 Supra, notes 155-57 and accompanying text.

of such a statute. Of particular concern will be the problem of ensuring that the statute does not overreach; that the procedures are not too rigid and time-consuming; that situations inappropriate for "notice and comment" are not brought within its ambit. If this is achieved then most of the concerns expressed earlier about the "costs" to the system of imposing such procedures will hopefully be met.

B. Alternatives to "Notice and Comment"

However, it is also apparent that it is not simply a case of an all-or-nothing approach. If the recommendation for a general statute does not prove acceptable, then I would urge that serious consideration be given to the possibility of recommending the enactment of legislation establishing a statutory body, the mandate of which would be the consideration of all the statutory rule and policy-making bodies in the province with a view to ascertaining whether those functions would be enhanced by the imposition of mandatory "notice and comment" procedures. If that view is adopted by the authority, then it should have jurisdiction, perhaps with the approval of Cabinet, to mandate adherence to such procedures. The Act itself should also lay down what those procedures would minimally be but the authority should have the power, in its discretion, to require more or perhaps modifications. As well, the authority should have a continuing obligation to monitor the performance of those statutory authorities on whom procedures have

been imposed and also for reconsidering periodically those situations in which "notice and comment" procedures were not imposed initially.

Superficially, a candidate for such a mandate would be the Statutory Powers Procedure Rules Committee, a statutory body created in 1971 by Part II of the Statutory Powers Procedure Act.³⁷² The present mandate of this Committee is to keep under review the procedural rules of all bodies exercising statutory powers of decision in the province of Ontario.³⁷³ Indeed, given the definition of "statutory power of

372 S.O. 1971, c. 47, section 26. The members of the Committee are:

- (a) The Deputy Minister of Justice and Deputy Attorney General;
- (b) The chairman of the Ontario Law Reform Commission;
- (c) A judge of the Supreme Court appointed by the Lieutenant Governor in Council;
- (d) A senior official in the public service of Ontario appointed by the Lieutenant Governor in Council "who is or has been a member of a tribunal to whose proceedings Part I applies";
- (e) A member of the Law Society of Upper Canada appointed by the Lieutenant Governor in Council;
- (f) A representative of the public and not a member of the public service appointed by the Lieutenant Governor in Council;
- (g) A professor of administrative law on the law faculty of an Ontario university appointed by the Lieutenant Governor in Council.

This Committee resulted from the recommendations of the McRuer Commission, supra, note 1 at 220-21.

373 Section 27. See also section 29 under which the Committee is given authority to require reporting and the development of procedural rules by bodies exercising "statutory powers of decision" and not covered by the minimum rules in Part I of the Act.

decision" in the Act, there is a possible argument that the present jurisdiction of the Committee covers at least some aspects of statutorily authorized rule-making.³⁷⁴

However, what has become clear in the seven years of its functioning is that the Committee, for whatever reason, has not been particularly active in performing the duties assigned to it presently, and as structured at this time, simply could not be relied upon or even legitimately expected to perform the mammoth task of scrutiny recommended in this paper.³⁷⁵ That suggests the creation of another

374 Section 1(1)(d) defines "statutory power of decision" in terms of decisions

... deciding or prescribing,

(i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not.

In Re Robertson and the Niagara South Board of Education, supra, note 93, the Divisional Court seemed to indicate that the definition did not catch decisions having general effect albeit that, for example, eligibility for a benefit was involved. In Robertson, the decision in issue was the closing of a school. If accepted, this of course narrows dramatically the type of subordinate legislation that may be subject to the Committee's jurisdiction, leaving situations of authority to make rules of particular, rather than general, applicability.

375 So far, the Committee, which became operative in late 1973, has issued one annual report in 1976 (Toronto: Ministry of Attorney General, 1976) and it contains such pessimistic statements as:

We are aware that these efforts [at encouraging consultation] have not been successful and that both
(cont'd)

administrative agency. On the other hand, given the present movement in Ontario towards the consolidation of administrative authorities, what may be more feasible is a complete revamping of the present Statutory Powers Procedure Rules Committee. Among the reforms that would be required are primarily an almost complete change in the composition of the Committee, drastically reducing the number of ex officio members and providing for the appointment of full-time members. As well, the Committee would need to be given the support staff necessary to engage in the extensive inquiry and research that the additional jurisdiction would involve. Also, the Committee should possibly be obliged to draw up each year a detailed program for scrutiny and approval by the Minister of Justice and the Attorney General and available also for public comment. Indeed, an essential part of its functioning in the area of rule-making procedures should be the promulgation in the Ontario Gazette both of a notice of intention to investigate a particular authority's rule-making

375 (cont'd) formal and informal rules have been made without consultation [at 9].

There are no fixed dates for Committee meetings; they are held as required by the workload and to suit the convenience, if possible, of those wishing to consult [at 9].

At present, all members of the Committee and its secretary and assistant secretary are available on a part-time basis only [at 13].

It is also significant that in 2-1/2 years, only five sets of rules or amendments to rules had been submitted to the Committee (at 10). I am also led to believe that subsequently the Committee's concerns have not been met and the level of activity has not increased.

procedures, with a request for comments, and then, at the conclusion of the investigation, a further notice stating the action intended and the content of any extra rules and once again calling for comment.

C. "Notice and Comment":
Principles for the Drafting of a Statute

1. Introduction

It is not my intention in this section to either provide the draft of a possible "notice and comment" statute or, for that matter, to engage in a detailed consideration of the contents of such a statute. What I will do, however, is to pinpoint some of the potential difficulties of a straight copy of section 553 of the American Administrative Procedure Act and make some suggestions in relation to a number of important areas such as the ambit of the Act and the types of procedure that should be imposed.

At the outset, it should be said that there is no present Canadian statute, federal or provincial, that provides a satisfactory model for use in the drafting of a "notice and comment" statute. Part I of the Ontario Statutory Powers Procedure Act, which lays down a minimum code of procedure for essentially judicial and quasi-judicial bodies, as already seen, excludes expressly regulation, rule and by-law making.

It should remain that way.³⁷⁶ The procedures of the Act are of an adjudicative-type, and as experience with specific statutes at the federal level in the United States and also with trial-type hearing provisions in some state administrative procedure legislation demonstrates dramatically, adjudicative-type procedures are for the most part quite unnecessary and unsuitable for the purposes of making rules. As well, not much purpose is served by looking to the specific provisions in recent federal statutes for "notice and comment" procedures for rule-making in certain contexts. Certainly, these provisions establish the basic mechanism of "notice and comment" in a satisfactory fashion. However, the concerns of a general statute of necessity have to be somewhat wider. In particular, while the creation of a basic requirement might not be too difficult, the task of deciding upon and the drafting of appropriate exceptions is extremely problematic.

2. Mandated Rule and Policy Making

One other matter that deserves to be disposed of at the outset is the issue of whether or not a "notice and comment" statute should make provision for the occasions upon which rule-making and policy-making should be required. This paper has accepted implicitly all along that

376 The American experience with trial-type procedures catalogued previously obviously bears this out.

rule-making and policy-making are important regulatory devices and should be utilised frequently. However, there are those who question seriously the wisdom of preferring rule-making and policy-making as methods of governing a country. At one level are advocates of far greater specificity in primary legislation.³⁷⁷ At another level are those who see policy and rule development through adjudication as a pre-eminent method of proceeding in many contexts.³⁷⁸ Aside from the fact that I have not directly faced these arguments in this paper, it is also clear to me that, even if you accept that rule-making and policy-making should be encouraged further, there is probably no way of satisfactorily specifying criteria in a general procedural statute as to when those devices should be employed. Indeed, there must be doubts as to whether it is all that appropriate to even attempt to lay down such rules in statutes, creating particular agencies, as has been suggested at times in the United States.³⁷⁹ So much would seem to depend upon the agencies' feel for particular regulatory problems. "Is this the kind of case where we feel confident about our ability to lay down a general rule or policy, or do we need to experiment on an ad hoc basis or gradually develop a sense of what is required through the accretion of individual adjudications?"

377 E.g. Cowan, supra, note 11 at 769-74.

378 See the discussion of this issue in the articles listed in footnotes 11, 249 and 252, supra.

379 See Davis, 1970 Supplement, supra, note 11 at 279.

In this regard, it is significant that Professor Janisch, one of the strongest advocates in Canada of the virtues of policy and rule-making, does not suggest statutory mandating of such techniques.

The real question today is not whether, but how, regulatory agencies can be persuaded to articulate policy ... It is my contention ... that regulatory agencies should be prodded into articulating policy. This might be done by ministerial initiative calling for a preliminary hearing on a question of policy which will serve as a precursor to a policy statement. In the meantime ... it will be up to the parties themselves to insist on policy clarification and to encourage the regulatory agency to spell out its policy to the greatest possible extent.

380

Professor Davis, however, in his 1970 Supplement to the Administrative Law Treatise, proposed consideration of a general statutory rule-making requirement and indeed drafted a tentative provision.³⁸¹ But even he confessed scepticism:

... [B]ut whether or to what extent it might produce unwarranted side effects is a question that needs full consideration.

382

Subsequently, in Administrative Law of the Seventies and its 1977 Supplement, he has not returned to this proposal, seemingly being reasonably contented with some rather remarkable examples of judicially enforced rule-making.³⁸³

380 Supra, note 11 at 98.

381 Supra, note 379.

382 Id., at 278.

383 See Administrative Law of the Seventies, supra, note 6 at 6.13, at 223-40 and 1977 Supplement at 77-83.

3. "Notice and Comment"

Turning now to the specifics of the American Administrative Procedure Act and how it might be modified for use in Ontario, it seems to me that the essential basis of that statute should be followed: namely, notice in the Ontario Gazette after the manner of section 553(b), followed by "an opportunity to participate". This should normally be in the form of the submission of written material (data, views and arguments) with the holding of oral hearings generally in the discretion of the agency or department.

Certain additions to the American provisions should be contemplated, however. For abundant clarity it should perhaps be stated that the material relied upon by the agency, either generated internally or submitted by those interested, should be available for public scrutiny unless there is some overriding need for confidentiality, the reasons for which should be spelled out by the agency and subject to appeal to a court. Only if all such material is available will the process be really responsive and this, to a large extent, seems to accord with the law developed by the federal courts under the Administrative Procedure Act.

As well, it might be advisable to specify that if the rule changes radically as a result of submissions, drafts of the amended rule should be advertised with a further opportunity to comment. This has also been suggested in the interpretations of the APA, though without

being completely accepted, seemingly because of some sense that it may involve excessive delay for the agencies.³⁸⁴ Finally, in line with the recommendations of the Administrative Conference,³⁸⁵ the discretion to hold oral hearings could be related to the situation where there is perceived to be a dispute as to specific and relevant facts and need for cross-examination.

4. Consideration by the Rule-Maker

The Administrative Procedure Act calls for "consideration"³⁸⁶ of the material presented, and similarly, the Model State Act speaks of the need "to consider fully"³⁸⁷ the submissions. In each case, the obligation is placed upon the "agency" or, additionally in the Model State Act, on the "governmental subdivision".³⁸⁸ What, of course, is lacking here is any specificity as to how that consideration is to

384 See Davis, Administrative Law of the Seventies, supra, note 6 at 6.01-1, 170-71 for a discussion of the reluctance of the courts to impose an obligation to "readvertise" a proposed rule which has been changed as a result of comments.

385 Recommendation 72-5. See also K.C. Davis, Administrative Law of the Seventies, supra, note 6 at 6.01-5, particularly 190; Williams, supra, note 320; Hamilton, supra, note 313.

386 Section 553(c).

387 Section 3(a)(2).

388 Id.

take place within the agency or government department and who is, for rule-making purposes, the agency or department.

That this is deliberate seems clear from the following extract from William F. Pederson Jr.'s Yale Law Journal article, "Formal Records and Informal Rule-making":

Only a very few, highly controversial issues can hope to receive detailed personal attention from the administrator of a busy agency, be he or she ever so competent. In all other cases, no single authority passes judgment on the rule. Different parts of the agency work on different parts of the rule, or on the same part from different angles -- and the rule emerges ... Given the diffuse nature of rule-making, it will be a rare document that cannot claim to have been considered somewhere to some extent by someone in connection with the rule-making, and a document almost as rare that will have received the personal attention of the administrator. 389

Pedersen then goes on to suggest that attention needs to be paid to improving the quality of the consideration by the agency of a proposed rule and the submissions made about it.³⁹⁰ However, significantly, the device he focuses on is not more specific designation of who within the agency should be obliged to consider the rule, but rather the imposition of an obligation on those within the agency to compile a fairly clearly-defined rule-making record.³⁹¹ Among other things, he sees the recommended procedural steps as having a tendency to

389 Supra, note 313 at 65.

390 Id.

391 This is the whole thrust of his article.

encourage more efficient and better directed consideration of the need for a particular rule.³⁹²

At this point, I suspect it is probably somewhat premature to think about obligations of agencies and departments to compile a rule-making record as part of a "notice and comment" procedure in Ontario. This stage is the product of a long and increasingly sophisticated experience with rule-making procedures. Moreover, it would scarcely be a case of simply using the "record" as defined for adjudicative tribunals in the Statutory Powers Procedure Act.³⁹³ In particular,

392 Id., at 73.

393 S.O. 1971, c. 47, section 20:

- (a) any application, complaint, reference or other document, if any, by which the proceedings were commenced;
- (b) the notice of any hearing;
- (c) any intermediate orders made by the tribunal;
- (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent or the purpose for which any such documents may be used in evidence in any proceedings;
- (e) the transcript, if any, of the oral evidence given at the hearing, and
- (f) the decision of the tribunal and the reasons therefor where reasons have been given.

(With respect to (f), it should be noted that a party can compel the giving of reasons in writing by virtue of section 17.)

Note, however, the suggestions of Pedersen for record compilation requirements in rule-making matters, id., at 78-82. See also K.C. Davis, Administrative Law of the Seventies, supra, note 6 at 29.01-6 and 1977 Supplement at 215-21.

problems would arise as to how to treat documents, generated within the agency or department itself or collected on other occasions, which will often play a critical role in the development of rules or policies. These are presently not covered by the provisions of section 20 of the Statutory Powers Procedure Act and serious thought would have to be given to whether all of this information would have to be placed in the "record" of the proceedings, whether it be for the purposes of review or for encouraging better consideration of the rule and comments within the agency.

On the other hand, failure to require statutorily the compilation of a rule-making record should not lead in the direction of being more specific as to who within the agency is to do the considering, or how in other respects that consideration is to be carried out. The flexibility that Pedersen refers to would appear to be vitally necessary. Thus, for example, it should not necessarily be a ground of complaint that a body such as the Ontario Securities Commission has appointed a hearing officer rather than taking evidence itself in a rule-making proceeding where oral testimony is seen to be required. This also means that, in cases where the rule-making authority rests with the Lieutenant Governor in Council, there would not need to be consideration by that body itself of the necessity for the rule and all the various submissions. That would be totally unrealistic and impractical. Rather, all that should be able to be expected would be consideration within the sponsoring department or agency, as in fact happens at the moment. This also means that the adoption of a

statutory "notice and comment" procedure would not necessarily involve the relocation of the formal locus of rule-making in different bodies. It would also preserve, for what it is worth, the possibility of check by Cabinet on the substance of regulations in situations where that body continues to retain the formal authority of promulgation.

5. Reasons

The end-product of the rule-making process under the Administrative Procedure Act is incorporation in the rules finally adopted of "a concise general statement of their basis and purpose".³⁹⁴ The principal purpose of this requirement seems to be to facilitate judicial review of rules to see whether they are within the ambit of the authority delegated, and it may be that such an aim is desirable in Ontario also. Mr. Baldwin, in his recent interview with the Toronto Star, would seem to suggest that more judicial review and other forms of scrutiny to check abuses of power are very necessary at the moment:

We have been careless and slovenly in the extent to which we have given away these powers and in our failure to ride herd on what happens to them after we have given them away. 395

Whether that be so or not is not really a concern of this paper.

However, aside from such considerations, such a requirement for a

394 Section 553(c).

395 Supra, note 370.

statement of purpose would, like a reasons requirement in administrative adjudication, seem to have the potential to encourage the agency or department to debate the basic policy issues thoroughly before finally promulgating a rule, and to this extent at least, may be a salutary provision.

6. Definition of Rule-Making and Exceptions

Of greater difficulty in this consideration of appropriate principles for an Ontario statute are the questions of how to define rule-making and what exceptions to provide for.

a) "Good Cause" Exception

One thing does appear clear. Despite the fact that it was grossly abused in the United Kingdom Rules Publication Act of 1893,³⁹⁶ an escape clause is vitally necessary. Both the APA³⁹⁷ and the Model State Act³⁹⁸ have such a clause, and this reflects the inevitability that there will be occasions on which delegated legislation-making

396 See e.g. Schwartz and Wade, supra, note 216 at 97-98.

397 Section 553(b) (B) .

398 Section 3(b) .

power must be used immediately in the public interest, e.g. control of a sudden outbreak of pestilence. The Model State Act uses the terminology of "an imminent peril to the public health, safety and welfare" while the APA appears somewhat wider, talking of "impracticable, unnecessary, or contrary to the public interest". Key to both sections, however, would seem to be the requirement for reasons in writing in each Act, a factor that hopefully ensures an absence of abuse of the authority, by virtue of the threat of judicial review if the reasons are inadequate. This seems to be borne out by the experience at the federal level in the United States. One commentator, in a footnote in an article on another subject, states that the "good cause" exception "has been relied upon extensively by the various federal agencies".³⁹⁹ However, as noted earlier, Professors Schwartz and Wade saw no abuse of the "escape" clause in the reported cases.⁴⁰⁰

As between the formulations in the Model State Act and the APA, the APA is perhaps to be preferred despite its greater width. This issue is, however, linked very much to the problem of how "rule-making" is defined in the Act. The wider the definition of rule-making and the narrower the other exclusions, the more need there is for an "impracticability" and "lack of necessity" exception. For example,

399 Warren, supra, note 300 at 383, n. 77.

400 Supra, note 298 and accompanying text.

for influential commentators such as Bonfield,⁴⁰¹ part of the problem with the total repeal of the interpretative rules, policy and procedures exception is that this would bring within the ambit of the Act the thousands of instructions of a rule or policy variety that a "mature" agency gives its employees and officers each month. It would also introduce the trouble of the "notice and comment" requirement for internal matters on which there was little public interest or ability to make any significant contribution. In such a context, if government is to proceed at all, a broad "good cause" exception would appear to be necessary or, alternatively, and perhaps preferably, a clear and limited definition of what constitutes interpretative rules, statements of policy and rules of organization, procedure, or practice for the purposes of the Act.

b) Rules of "Particular Applicability"

This discussion leads conveniently into the question of the definition of "rule-making" and the problem of other exemptions or exceptions.

401 "Some Tentative Thoughts", supra, note 309 at 118. Bonfield also lists among other reasons for retention: it would cause adherence to section 553 where the public has little interest in participation or is unlikely to contribute significantly; uncertainty would be increased as to when section 553 procedures would be required; greater use of the "good cause" exemption; discouragement of rule-making of this kind (id., at 118-28). Subsequently, at least as far as Iowa is concerned, he has changed his mind and advocates repeal despite these arguments: "The Iowa Administrative Procedure Act", supra, note 309 at 859-60, f.n. 493.

One of the points of concern with the federal APA is its inclusion of rules of "particular applicability".⁴⁰² According to Professor K.C. Davis, this has not in fact caused trouble in practice in distinguishing between what is an adjudicative "order" involving more onerous procedures under the Act, and what is a rule.⁴⁰³ Indeed, he recommends, in his 1970 Supplement to the Treatise, that one way of encouraging timid agencies to engage in more rule-making is to convince them that rules do not need to be

... in the form of an abstract generalization; a rule can be limited to resolving one or more hypothetical cases, without generalizing. 404

Some sense of what this involves can be gleaned by looking at some of the statements made by the Ontario Securities Commission about how it plans to interpret its policies in particular situations in the future.⁴⁰⁵ If Davis' comments are accepted and it is realised that what is being talked about is basically the use of rule-making to deal with particular hypothetical situations, there may be little reason to remove the words "particular applicability" from the definition of "rule".

402 Section 551(4).

403 See Administrative Law Treatise, supra, note 5 at 5.02, 294-97; Administrative Law of the Seventies, supra, note 6 at 1.04, 7 and note 27, supra.

404 Supra, note 11 at 6.14, 280.

405 See OSC Bulletin, November 1978 at 323, where the OSC clarifies its policy on a particular matter by reference to certain specific problems.

c) The Specific Exceptions

1) General

The definition also includes interpretative and procedural rules as well as statements of policy,⁴⁰⁶ and it is only in relation to some of the particular obligations in the Act that they are subsequently excluded.⁴⁰⁷ The question then becomes whether or not those subsequent exclusions are justified. Most commentators, as we have seen already, are very cautious about the wholesale removal of these particular exceptions. However, of the other exemptions in the Act, the military and foreign affairs exception⁴⁰⁸ is not found in the Model State Act, and for obvious reasons is not needed in Ontario either, though perhaps a case could be made for certain aspects of inter-provincial and federal-provincial relations. It also now seems to be agreed that the "public property" category of exemption of the APA, also without a Model State Act equivalent, should not be retained⁴⁰⁹ and I can think of no reason for singling these situations out for special treatment in any Ontario statute. However,

406 Section 551(4).

407 Section 553(b) (A).

408 Section 553(a) (1).

409 Supra, notes 309 and 312 and accompanying text.

a strong claim can certainly be made for retention of the "agency management or personnel" exemption.⁴¹⁰ It is simply difficult to see any significant public interest in the internal or "domestic" workings of a government department or administrative agency in relation to staff matters, as distinct from their procedures when dealing with the public, or their policies for administering their statutes. Significantly, of all of the exceptions in section 553, this is the only one that has not been the subject of extensive critical evaluation.

2) Interpretative Rules and Policy Statements

It is clear from the way in which many of their interpretative rules and policy statements are treated by government departments and administrative tribunals, that despite the fact that they do not formally create legally binding rights and obligations, they as good as achieve those results. This in particular is aided by the fact that now, particularly after the decision of the Supreme Court of Canada in the Capital Cities case, the legal requirement

410 Section 553(a)(2). See note 309, supra. Note also the fact that this is a narrower category than "agency organization, practice and procedure", excluded by section 553(b)(a). Its ambit would appear to be matters of staffing relationships and other matters which are internal to the agency and distinct from its statutory mandate e.g. employment of cleaners, purchase of supplies. See notes 421 ff. and accompanying text.

... to maintain a reserve clause willingness to recognize the exceptional [if judicial review for fettering of discretion is to be avoided] may not seriously affect a regulatory agency's desire for consistency. 411

There is also presumably, in the voluntary recognition of "notice and comment" procedures for such policy-making by such bodies like the CRIC and the OSC, a sense that participatory rights are important in the development of these de facto laws.

However, there remains the problem of separating out by legislative statement those instances of interpretative rules and policy statements where, because of their "substantial impact" (to use the language of the American federal common law), "notice and comment" procedures are appropriate. Interestingly, the APA does not include a definition of either "interpretative rules" or "general statements of policy". With respect to the former there seems to have been acceptance at the time that a definition was not needed, as past experience made such "rules" obvious.⁴¹² However, as subsequent history has shown, what may have seemed obvious in 1946 is now no longer so, particularly in relation to situations where the substantive rule-making activities of agencies are formally indistinguishable from the method of promulgating

411 Janisch, supra, note 11 at 97.

412 See e.g. Warren, supra, note 300 at 370-71; Bonfield, "Some Tentative Thoughts", supra, note 309 at 108.

interpretative rules.⁴¹³ There have also come to be problems with the meaning of the qualifying word "general" in relation to policy statements.⁴¹⁴

At this point there would seem to be three alternatives for any Ontario statute in this area: (1) exclude all interpretative rules and policy statements and let this be handled by the common law, specific legislation, or voluntary tribunal or department action; (2) include all interpretative rules and policy statements and allow the "good cause" exception to take account of situations where "notice and comment" is unnecessary; or, (3) attempt to define interpretative rules and statements of policy in such a way as to exclude inappropriate situations for "notice and comment".

Of the three, the least appealing is the first. As experience with bodies such as the OSC and WCB demonstrates, whether statutorily mandated or not, administrative agencies do act by policy statement rather than by formal regulation or rule. Whether this is desirable is, in many ways, beside the point. If the impact of such activity is

413 See sections 5.01-04 of Davis, Administrative Law Treatise, 1970 Supplement to the Treatise, Administrative Law of the Seventies, and 1977 Supplement as well as Warren, id., Bonfield, id., and the other articles on interpretative statements contained in note 309, supra.

414 See Bonfield, id., at 113-117; Asimow, supra, note 309 at 531-40; Comment, "A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy", supra, note 309.

virtually indistinguishable from that of a formal rule, and if the law condones such practices (as Capital Cities indicates), then little purpose is served in enacting a general "notice and comment" statute which excludes such functions totally. The statute could be so easily avoided as to become a dead letter.

As to the third alternative, it is sobering to note the lack of confidence of Professor K.C. Davis in attempting a satisfactory definition of what interpretative and policy functions should be excluded from the operation of the Act.⁴¹⁵ The recommendation of the Administrative Conference, addressed to the agencies rather than Congress, is that such rules be subject to section 553 procedures if they are "likely to have substantial impact on the public".⁴¹⁶ If used in any statute this would be an encouragement to judicial review. Of course, judicial scrutiny may be inevitable anyway, even if interpretative rules and policy statements are excluded, as is demonstrated by the development of a substantial common law at the federal level in the United States on rule-making hearings in relation to policy statements and interpretative rules. That also may be the case if the second alternative is accepted. However, given the

415 Supra, note 309. Initially Davis seems to have advocated that there be no contraction of this section because of the threat that it would pose to the use of interpretative statements and policy rules by agencies. See note 365, supra.

416 Supra, note 311.

Canadian tradition of judicial review, the agency's expertise may achieve greater recognition to exclude for "good cause" rather than a seemingly more objective "substantial impact" test.⁴¹⁷ Accordingly, it is my tentative recommendation in this area that interpretative rules and policy statements not be excluded from the Act but that they be left to be dealt with under a broadly worded "good cause" exception, in which the initial discretion as to whether "good cause" exists is left to subjective determination by the agency.

I recognize, of course, the real danger that this may encourage agencies and departments to engage in less open policy-making or issuance of interpretative guidelines than is presently the case. However, given the impact of many of these policies and statements, it is, in my view, a risk worth taking. If, however, this does not prove acceptable, then as an alternative, attention should be given to the Administrative Conference's recommendation for other than "substantial impact" policies and interpretative rules. (Indeed, this may also be advisable in relation to interpretative rules and statements of policy excluded by virtue of my recommended "good cause" exception.) This

417 Of course, much may depend upon how the provision is worded. For example, review opportunities would be decreased if "substantial impact" was made to depend on the subjective opinion of the agency. However, without a subjective empowering clause of that kind, it is my hunch that "substantial impact" as a test is one where there would be far less deference to agency expertise and judgment than on the more open-ended term "good cause". For an example of court deference in the face of a provision interpreted as giving a subjective judgment to the federal Cabinet, see Berryland Canning, supra, notes 39-41 and accompanying text.

recommendation, subject to its own "good cause" exception, would require a post-adoption "notice and comment" procedure for interpretative rules and policy statements.⁴¹⁸ Of course, if all policy manuals of agencies and departments are made freely available, as Professor Ison recommends in relation to the WCB Claims Adjudication Manual,⁴¹⁹ there is a de facto informal opportunity for public comment to the agency or department anyway. Nevertheless, there may be advantages to formalising that process and obliging the agency or department to actually consider and respond to representations, particularly in a situation where interpretative rules and general policy statements are otherwise excluded from the operation of a "notice and comment" procedure. In the further alternative, Professor Davis' words should be heeded:

Surely a full study can carry further the program of law reform the courts have initiated. The dominant assumption that nothing can be done about the exception of interpretative rules from notice and comment procedure should be subject to re-examination. Something can be done -- without entirely eliminating the exception.

420

418 See Asimow, supra, note 309 at 578 for a discussion both of the Administrative Conference's and his own proposals for post-adoption "notice and comment" procedures for all interpretative rules and policy statements which do not have "a substantial impact".

419 Supra, note 186 at 51-52.

420 Administrative Law of the Seventies, supra, note 6 at 6.01-10, 204-05.

3) Rules of Agency Organization, Practice and Procedure

On the issue of the treatment of the rules of "agency organization, practice and procedure", Professor Davis is also concerned that there be further study:

Similarly, the exception of all procedural rules in all circumstances seems excessive. When an agency formulates important procedural rules and some parties are vitally interested in the rules, opportunity to send in written comments clearly should be required. At the other end of the spectrum, when small and quick changes are needed, the disadvantages of public procedure could clearly outweigh the advantages.

421

As we have seen already, there is recent Canadian precedent for the operation of "notice and comment" procedures in the advance publication of proposed procedural rules by the CRIC in relation to both broadcasting and telecommunications. Indeed, the agency went beyond affording an opportunity to make written comments to the stage of a public hearing in each case. What we are here concerned about, of course, are the procedures adopted by an adjudicative-type body and there may not be anywhere near the same value or indeed interest in the providing of "notice and comment" opportunities in relation to internal agency procedures and practices. In some instances though, how matters are dealt with internally may be a vital factor in their ultimate disposition. Nevertheless, it may well be that the internal

421 *Id.*, at 205. Note, however, section 553(a)(2), the agency "management or personnel" exception for which a justification does exist if interpreted narrowly. See note 410, supra, and accompanying text.

management of agencies and departments should, for the most part, remain the prerogative of those running such organizations.

In this area my recommendation is that the "notice and comment" procedure of any general statute be applied immediately to the rules of procedure of any body coming within the scope of Part I of the Statutory Powers Procedure Act; namely, most statutory bodies in Ontario exercising adjudicative-type functions.⁴²² As well, consideration should be given to adding some of the bodies presently excluded from the provisions of Part I.⁴²³ In particular, the relevant provision in the Federal Court Act⁴²⁴ indicates that there may be room for requiring Court rules to be subject to "notice and comment" procedures, and any regulations governing the procedures of arbitrators, coroners and public inquiries should perhaps be included.

Of course, it might be asked whether this is necessary given the present existence of the Statutory Powers Procedure Rules Committee, but its seeming lack of both activity and effectiveness over a period of some seven years suggest that it either should be supplemented, or

422 See section 3(1). The section provides that the Act applies to tribunals "in the exercise of a statutory power of decision ... where ... required by or under such Act or otherwise by law to hold or to afford to the parties to the proceedings an opportunity for a hearing before making a decision."

423 E.g. coroner's inquests, investigating and reporting bodies.

424 Supra, note 115.

perhaps more realistically, replaced. Indeed, even an active Committee with other than ex officio members would almost certainly not be able to reproduce the significant advantages of opening up the procedures of particular tribunals for public comment by those who are most vitally concerned with the functioning of those tribunals. It would also, in my view, be inappropriate to give that task to a revamped Statutory Powers Procedures Rules Committee. A hearing or "notice and comment" procedure conducted by the tribunal itself is far more likely to be efficient and focused on real procedural problems than is a generalist committee, the real value of which is in the checking of excesses or egregious deficiencies, making suggestions on the basis of its experience with other regulatory contexts and urging appropriate levels of consistency as between similar processes.

Aside from bodies covered by Part I of the Statutory Powers Procedure Act, as very recent Ontario cases demonstrate,⁴²⁵ other agencies perform adjudicative-type functions which make them amenable to certain procedural requirements. Thus, in Webb v. Ontario Housing Corporation,⁴²⁶ it was held by the Ontario Court of Appeal that the Corporation was obliged to act in a procedurally fair manner before terminating the tenancy of an occupant of Corporation-owned housing. Despite the fact that it held that the Statutory Powers Procedure Act

425 See e.g. Downing v. Graydon, *supra*, note 38; Webb v. Ontario Housing Corporation, *supra*, note 38.

426 Id.

did not apply,⁴²⁷ the Court asserted that the Corporation had to

... treat the appellant fairly by telling her of the complaint(s) or case against her and giving her an opportunity, if she wished, to make an answer to those complaints. 428

Given the obvious public interest in the development of agency procedures for the taking of such action, it would seem unwise to exclude completely from the ambit of the proposed "notice and comment" procedure, all instances of departmental or agency practice and procedure not coming within Part I of the Statutory Powers Procedure Act. Accordingly, I would recommend that either this be handled by the "good cause" exception or a "substantial public impact" test, or alternatively, that the problem be studied further, as recommended by Davis in the American federal context.⁴²⁹

d) Which Agencies?

Both the APA and the Model State Act exclude the legislature and the courts from their ambit, and nothing in the critical writings on the operation of the statutes seriously suggests a broadening of categories excluded by the definition. Indeed, as just seen, there may well be a case for including within the ambit of the Act certain kinds of

427 Id., at 6-8.

428 Id., at 16.

429 Supra, note 420 and also in his letter to the Senate Subcommittee, supra, note 309.

rule-making by the courts, though one would presumably want to give serious consideration to whether or not this should stretch beyond formal rules to practice directions.

This possibility aside, I can see no reason for deviating from the American position on this point. However, given the possibly special position of municipalities and other local government bodies, further study is almost certainly needed as to whether they should be included. The same may also apply to those historically independent bodies which now have a statutory basis, such as universities and colleges and the disciplinary tribunals of professional bodies. On the other hand, the same public interest reasons that make the regulation or statutory control of such bodies a continuing necessity, would also seem to indicate that their rule-making functions, at least in some respects, should be subject to general "notice and comment" procedures.

7. A Specific Problem

One of the burning issues in regulatory law at the moment is the extent to which regulatory agencies should be subject to political direction in the conduct of their mandate.⁴³⁰ At present, there are

430 See the discussions of this issue by Janisch, supra, note 11 at 89-103 and also in "The Role of the Independent Regulatory Agency in Canada", supra, note 167 at 108-18.

numerous devices, both formal and informal, by which such direction is achieved, ranging from informal contacts between departmental officials and politicians with agencies through public statements of government policy intended to influence agency decision-making,⁴³¹ to formal statutory devices authorizing the giving of statutory directions to "independent" tribunals,⁴³² or alternatively, allowing "appeals" from a tribunal's decision to a minister⁴³³ or to Cabinet.⁴³⁴ The uses and abuses of these various channels of political communication with regulatory agencies are excellently catalogued by Professor Hudson Janisch in his Osgoode Hall Law Journal article, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada",⁴³⁵ and it is not within the ambit of the present study to traverse the reasons for and against such directive authority, or even the general question of the procedures by which it is carried out. However, one highly relevant issue is that

431 The Innisfil saga, supra, note 94 provides an ample example of this. See also the recent controversy over beer and junior hockey. Globe and Mail, 12 January, 1979: "LLBO ordered to re-examine ban on beer and hockey".

432 See the recent amendment to the Public Vehicles Act, R.S.O. 1970, c. 392, infra, note 437 and accompanying text.

433 See e.g. Ambulance Act, R.S.O. 1970, c. 20, section 16; the role of the Review Board in relation to the Minister in the Ontario Heritage Act, S.O. 1974, c. 122, Part VI.

434 See e.g. section 64(1), National Transportation Act, R.S.C. 1970, c. N-17; section 21(1), Ontario Highway Transport Board Act, R.S.O. 1970, c. 316.

435 Supra, note 11 at

of the applicability of a "notice and comment" procedure to statutorily-authorized policy directives.

A reasonably typical example of such an authority is contained in a 1978 section amending the Public Vehicles Act.⁴³⁶ The background to the amendment is discussed by Janisch⁴³⁷ and it provides in part:

(1) The Lieutenant Governor in Council may by order from time to time issue policy statements setting out matters to be considered by the Ontario Highway Transport Board when determining questions of public necessity and convenience and the Board shall take such matters into consideration together with such other matters as the Board considers appropriate where the application or reference is made after the policy statement is gazetted.

(2) An order made under subsection 1 shall be published in The Ontario Gazette.

As Janisch notes, the exercise of such powers "is in sharp contrast with the potential for open policy-making by regulatory agencies",⁴³⁸ and he goes on to recommend that various devices be employed for ensuring that such policy directions will be rarely used, and if found to be necessary, will be well-considered.⁴³⁹ In particular, he urges that the need for such policy statements could be circumscribed considerably if the minister or Cabinet had specific authority to

436 Section 26, R.S.O. 1970, c. 392, as inserted by S.O. 1978, c. 23, section 1. See Order-in-Council 3005/78, Ontario Gazette, Vol. 111-45, November 11, 1978 for the first policy statement issued by the Cabinet pursuant to this power.

437 Supra, note 11 at 71-72.

438 Id., at 91.

439 Id., at 103-106. See also note 167 at 119.

direct rule-making hearings on specific matters of policy.⁴⁴⁰ At such hearings, the department or minister would be encouraged to participate actively. Janisch also suggests that, within the present structure, more use could be made of hearings by parliamentary committees when "political" directives are proposed.⁴⁴¹ This, he suggests, would enable the agency to react to proposals before they become rigid government policy.

If accepted, these proposals would certainly have the potential to achieve a compromise between the position of the "independent" agencies and the political arm of government. One other question, however, is whether a further alternative is to subject such policy directives to "notice and comment" procedures. The traditional argument is that in such matters, the ultimate sanction for improper or stupid use of such political control is the ballot box and that this political accountability is all that is needed. However, the chance that a particular political directive to an agency or tribunal will ever be in anyone's mind when they cast their ballot at a general election is extremely remote. (Of course, election outcomes may be influenced indirectly by the withdrawal of campaign financial support by substantial aggrieved interests.) There is also little reason to believe that policies generated at a ministerial level or by Cabinet

440 Id., at 105. (Also, note 167 at 119.)

441 Id., at 104-05.

will be any less wrong-headed than those developed at the agency or tribunal level. The real issue should be whether "notice and comment" opportunities would contribute to the development of a better policy in situations where use of the directive power is contemplated.

Aside from the fact that the issues which are likely to be subject to the use of the directive power will probably be temporarily more politically charged, there would seem to be little reason for differentiating between this type of policy statement and ones generated by the agency or department itself as part of its normal functions. Indeed, as well as producing a better directive or perhaps convincing the government of the lack of need for a directive, the participatory opportunities afforded by "notice and comment" procedures could have a defusing tendency even in the most highly-charged political contexts. Accordingly, I see no reason for immunising such policy directives from the general applicability of a "notice and comment" statute. Specific situations can be dealt with, if necessary, by the proposed "good cause" exception.

8. Petitions for Rules

Both the Administrative Procedure Act⁴⁴² and the Model State Act⁴⁴³ make provision for the public to petition for either the making, amendment or repeal of rules. Moreover, as noted earlier,⁴⁴⁴ this right under the Administrative Procedure Act extends to interpretative rules, general statements of policy and rules of agency organization, procedure and practice, these being otherwise excluded from section 553.

Such a provision would appear to be justified in the sense that not only does it provide a further opportunity for public involvement in the process of government, but it also recognizes the reality that not all good ideas emanate within agencies or departments. As well, it can be seen as a check against an agency or department avoiding politically unpalatable rule-making situations, particularly where judicial review of peremptory refusal to consider a petition is possible.⁴⁴⁵

442 Section 553(e).

443 Section 6.

444 Supra, note 287.

445 Davis, Administrative Law of the Seventies, supra, note 6 at 6.01-12, 207-09.

There does not seem to have been much consideration of the use or usefulness of such procedures in the United States.⁴⁴⁶ However, for the reasons identified above, I would advocate the inclusion of such a provision in any Ontario statute. Certainly, approaches can be made informally at present but the existence of a formal mechanism has its advantages, not the least of which is the official recognition that it accords public initiation of rules and policies.

9. Relationship of "Notice and Comment"
to Present Regulations Act

One way of handling the introduction of a "notice and comment" procedure in the province of Ontario would be by way of amendment to the present Regulations Act. Indeed, it makes considerable sense to locate all general procedural obligations relating to the promulgation of regulations in the one statute. Of course, as proposed in this paper, the "notice and comment" procedures would apply to a broader range of activity than is encompassed by the present definition of "regulation" in the Ontario Act. Accordingly, the issue would have to be faced as to whether those activities not coming within the present definition of "regulation" but subjected to "notice and comment" procedures should also be subject to the other provisions of

446 See, however, Bonfield, "The Iowa Administrative Procedure Act", supra, note 309 at 892.

the Regulations Act, e.g. filing with the Registrar of Regulations, scrutiny by the Standing Committee on Regulations. On the other hand, it might also be asked whether some of these procedures would be rendered redundant by the adoption of a "notice and comment" requirement, e.g. scrutiny by the Standing Committee on Regulations.

Many of the provisions of the Regulations Act are aimed at ensuring ample publication of regulations, and consonant with this, an orderly system of filing and recording.⁴⁴⁷ Insofar as that system is satisfactory, there would seem to be no reason for dispensing with it nor against extending it to the broader category of instruments subject to the proposed "notice and comment" procedure. Ready access to the law is an undeniable virtue, and when it is admitted that interpretative bulletins and policy statements are de facto "law", the argument for elevating them to the status of other forms of subordinate legislation and regularising their publication would seem to be clinching.

Under the Administrative Procedure Act, proposed rules are generally required to be published in the Federal Register not less than one

447 See sections 2-9.

month before their effective date.⁴⁴⁸ No provision is made, however, for further "notice and comment" opportunities if substantial changes are made to proposed rules as a result of reaction to the initial publication. Earlier, it was suggested that there might be a case for the inclusion of such requirement in any Ontario statute introducing a general "notice and comment" requirement. This aside, one troubling question is whether the original notice should relate to an effective date of the proposed "rule" not less than thirty days away; or whether the notice should give not less than thirty days to comment with the effective date of the rule being, as now, the date of its "making"; or perhaps alternatively, the date of publication in final form in the Ontario Gazette, or perhaps some period after that publication in final form.

In my opinion, there is a case to be made for delaying effectiveness till the appearance of the rule in final form in the Gazette. Without such a provision, even those making submissions cannot be sure when and in what form a particular rule will come into effect. Have the comments either influenced the agency to amend the rule or delay its

448 Section 553(d). The exceptions are:

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy, or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

implementation? To know that may require those interested taking the initiative of finding out from the agency itself. Given the frequency with which the Gazette appears and the necessity for the rule to be published in final form anyway, no great harm would appear to result from a requirement that effectiveness be delayed until publication, and that the notice period in the initial advertisement of a proposed rule be related to the making of "comment" rather than the effective date of the rule. However, there would seem to be no necessity for postponing the effectiveness of new "rules" beyond the date of publication in final form.

Of course, there are a number of reasons for such a requirement: to allow for further informal opportunities to make representations, to give those affected an opportunity to reorder their affairs to adjust to the new laws, to allow time for the commencement of proceedings for judicial review. It is questionable, however, whether any of these reasons justify such a provision, particularly given the further delay it involves. This is particularly true if the rule-maker is obliged to republish and call for further comment on any regulations that have been changed substantially as a result of the "notice and comment" procedure. In such cases and probably generally, "notice and comment" itself provides ample opportunity for the making of submissions, and the issue of whether the coming into force of the rule should be delayed because of the need to afford adjustment time, is something that can probably be handled in the discretion of the rule-maker. Finally, notwithstanding the greater emphasis on the role

of judicial review of rule-making in the United States, it is not required there, suggesting that the facilitation of judicial review should not carry as much weight in Canada as a basis for delaying effectiveness.

As far as the place of the Standing Committee on Regulations is concerned, I would recommend that that continue and be applied to all instances of rule-making coming within the ambit of the "notice and comment" procedure. Alternatively, consideration might be given to devising a more effective kind of legislative scrutiny.⁴⁴⁹ Despite the fact that the major check on the abuse of delegated authority would undoubtedly come to be the "notice and comment" procedure, it would be inconceivable that the Legislative Assembly be totally excused from responsibility for the actions of its delegates, and if that responsibility is to be anything other than formal, some method of systematic scrutiny seems vital. Also, to be systematic, it must take account of all subordinate law-making and not just that which is in the form of "regulations" as defined presently.

449 See notes 142-144, supra, and accompanying text for critical comment on the Committee as structured and operating at present.

D. Conclusions

Whatever the ultimate outcome of current attempts to reduce the extent to which regulation permeates our lives, it is abundantly clear that in this complex society an incredible amount of government regulation, often in very important areas, is going to be carried on through the agency of subordinate legislation and on the basis of policies and interpretations of legislation developed by delegates of the legislature. It is not only obvious that the legislature cannot do everything, but it is also desirable that it not even attempt to do everything. Time for deliberate consideration and the application of expert knowledge count for a lot in government, and the elected representatives have neither unlimited time nor boundless expertise.

However, it is also important that those governing be responsive to the hopes and expectations of the governed, and to the extent that the real locus of government moves away from the legislature, the greater are the chances that responsiveness will be diluted. Checks, therefore, need to be devised to ensure the responsibility of those who "enact" law outside of the parliamentary arena. Providing that subordinate legislation emanate from the Lieutenant Governor in Council is not sufficient. Not only does it not catch all subordinate "legislation", but because of the volume that it does catch, it is obviously impossible to expect the necessary degree of scrutiny from an inevitably busy Cabinet. After-the-event scrutiny by a parliamentary committee has also not proved to be adequate. The mandate is limited,

the necessary expertise is inevitably lacking, and once again, the volume is overwhelming.

Given this situation and a commitment on the part of our society that people generally should have an opportunity to say something about laws that affect them substantially, either personally or through an elected or legal representative, there appears to me to be a very strong argument for providing a greater opportunity for participation in the formulation of subordinate laws of all kinds. In 1946, the United States Congress accepted this need with the enactment of the Administrative Procedure Act and most of the states have subsequently followed this example. The experiment has, by all accounts, been a success and most of the calls have been for extension rather than contraction of the APA. Of course, the value actually achieved by participation, beyond the civic sense of involvement that comes from taking part, is difficult to measure. However, in most instances, there is reason to believe that decisions will be better if the decision-maker has the benefit of more, rather than less, knowledge of both the facts and the positions of those primarily affected. Voluntary acceptance of rule-making procedures by some agencies in this country is at least some demonstration of this.

Part of the case for freedom of information legislation rests in a sense that, in a democracy, it is of the essence that citizens know how they are governed. Without that knowledge, participation in the electoral process becomes almost meaningless. It is also abundantly

clear that the demands for freedom of information spring not only from a desire that one's vote be more informed, but also from an anxiety on the part of citizens to become more directly involved in the day-to-day processes of government. One aspect of this is engaging in vigorous criticism of and attempts to change existing rules and policies. However, that kind of involvement has its deficiencies in the sense that involvement after decisions have already been taken may tend to be less influential. Indeed, even if influential, there are costs and inefficiencies involved. Effort has been generated to reverse the content of a rule or policy that need not even have begun to have effect had there been an opportunity for those concerned to participate in the initial formulation process. Against this background, there seems an obvious case for linking freedom of information with rule-making procedures. If freedom of information legislation is designed to improve opportunities for citizen participation in government, it has a far greater chance of achieving this goal if linked to a statute requiring notice of and the opportunity to comment on the substance of impending rules and policies.

It is therefore my recommendation that the government of Ontario introduce legislation amending the Regulations Act and providing for a "notice and comment" procedure for rule-making after the model of section 553 of the United States Administrative Procedure Act. In my view, most of the provisions of that Act are readily transplantable with minor modifications into an Ontario setting. However, the Ontario legislation should also move somewhat beyond the present scope

of the APA in line with some of the influential arguments for amendment in the United States. In particular, serious consideration should be given to extending the Act to interpretative rules, general statements of policy and the making of procedural rules by adjudicative bodies -- areas presently excluded in the APA.

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APPENDIX 1

Sections 551 and 553 of the
Administrative Procedure Act
5 U.S.C., Chapter 5

§ 551. Definitions

For the purpose of this subchapter---

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include---

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;
or except as to the requirements of section 552 of this title---

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory;
or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix;

• • • •

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

• • • •

§ 553. Rule making

(a) This section applies, accordingly to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

APPENDIX 2

Sections 1, 3 and 6 of
Model State Administrative Procedure Act

SECTION 1. [*Definitions.*] As used in this Act:

(1) "agency" means each state [board, commission, department, or officer], other than the legislature or the courts, authorized by law to make rules or to determine contested cases;

....

(7) "rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued pursuant to Section 8, or (C) intra-agency memoranda.

....

SECTION 3. [*Procedure for Adoption of Rules.*]

(a) Prior to the adoption, amendment, or repeal of any rule, the agency shall:

(1) give at least 20 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely request of the agency for advance notice of its rule-making proceedings and shall be published in [here insert the medium of publication appropriate for the adopting state];

(2) afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In case of substantive rules, opportunity for oral hearing must be granted if requested by 25 persons, by a governmental subdivision or agency, or by an association having not less than 25 members. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

(b) If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period of not longer than 120 days [renewable once for a period not exceeding ____ days], but the

adoption of an identical rule under subsections (a) (1) and (a) (2) of this Section is not precluded.

(c) No rule hereafter adopted is valid unless adopted in substantial compliance with this Section. A proceeding to contest any rule on the ground of non-compliance with the procedural requirements of this Section must be commenced within 2 years from the effective date of the rule.

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SECTION 6. [*Petition for Adoption of Rules.*] An interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 30 days after submission of a petition, the agency either shall deny the petition in writing (stating its reasons for the denials) or shall initiate rule-making proceedings in accordance with Section 3.

COMMISSION RESEARCH PUBLICATIONS

The following list of research publications prepared for the Commission may be obtained at the Ontario Government Bookstore in Toronto, or by mail through the Publications Centre, 880 Bay Street, 5th Floor, Toronto, Ontario M7A 1N8.

All publications cost \$2.00 each. Orders placed through the Publications Centre should be accompanied by a cheque or money order made payable to the "Treasurer of Ontario".

Further titles will be listed in the Ontario Government Publications Monthly Checklist and in future Commission newsletters.

The Freedom of Information Issue: A Political Analysis

Research Publication 1

by Prof. Donald V. Smiley, York University

Freedom of Information and Ministerial Responsibility

Research Publication 2

by Prof. Kenneth Kernaghan, Brock University

Public Access to Government Documents: A Comparative Perspective

Research Publication 3

by Prof. Donald C. Rowat, Carleton University

Information Access and the Workmen's Compensation Board

Research Publication 4

by Prof. Terence Ison, Queen's University

Research and Statistical Uses of Ontario Government Personal Data

Research Publication 5

by Prof. David H. Flaherty, University of Western Ontario

Access to Information: Ontario Government Administrative Operations

Research Publication 6

by Hugh R. Hanson et al.

Freedom of Information in Local Government in Ontario

Research Publication 7

by Prof. Stanley M. Makuch and Mr. John Jackson

Securities Regulation and Freedom of Information

Research Publication 8

by Prof. Mark Q. Connelly, Osgoode Hall Law School

Rule-Making Hearings: A General Statute for Ontario?

Research Publication 9

by Prof. David J. Mullan, Queen's University

